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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NEW BRUNSWICK,

WITH TABLES OF THE NAMES OF THE CASES
AND PRINCIPAL MATTERS.

By JAMES HANNAY, Esquire,
BARRISTER-AT-LAW.

VOL I.

CONTAINING THE CASES FROM HILARY TERM, IN THE THIRTIETH YEAR, TO MICHAELMAS TERM, IN THE THIRTY-THIRD YEAR OF QUEEN VICTORIA, INCLUSIVE, 1867, 1868, 1869.

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" CHARLES FISHER.

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SOLICITOR GENERAL.

THE HONORABLE EDWARD WILLISTON.

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TABLE OF CASES

REPORTED IN THIS VOLUME.

	page
A	
Abell *v.* Light, ... 97	240
Alexander *v.* Hartt, ...	161
Allen *v.* Ferguson, ...	149
Alward *v.* Sharp, ...	286
Armstrong *v.* McCaffrey, ...	525
Armstrong, Leary *v.*	22
Armstrong, Bridges *v.*	493
Assessors of Kings, Regina *v.*	528
Ayles, Wortman *v.*	68
B	
Baldwin *v.* Hitchcock, ...	310
Bank of New Brunswick *v.* Cronk, ...	228
Barbarie, Peck *v.*	523
Barnes, Foshay *v.*	452
Barton, White *v.*	1
Belyea, Rose *v.*	109
Bishop *v.* Robinson, ...	68
Boyne, Grant *v.*	432
Bridges, Armstrong *v.*	493
Bryson, Hamilton *v.*	629
Byers *v.* Harrigan, ...	230
C	
Cameron *ex parte*, ...	306
Campbell *v.* Wheeler, ...	269
Campbell, Gilbert *v.* 258	474
Carman, McLeod, *v.*	602
Chandler Regina *v.*	556
Chassey, Robinson *v.*	50
Commercial Bank *v.* Williston, ...	283
Comrs. of Sewerage, St. John, Regina *v.* ...	3
——— of E. & N. A. R., McLeod *v.*	584
——— of Germantown Lake, Regina *v.* ...	341
——— E. & N. A. R. DesBrisay *v.*	48
Connell *v.* Dickinson, ...	459
Condell *v.* Price, ...	332
Coram *v.* Mayor, &c., St. John, ...	443
Cougle, St. George's Church *v.*	620
Coy *v.* Coy, ...	177
Coy, Miles *v.*	174
Cregan, Regina *v.*	36
Cronk, Bank of New Brunswick *v.*	228
D	
Dalton *v.* Hamilton, ...	422
DesBrisay *v.* Comrs. of E. & N. A. R., ...	48
——— *v.* McLeod, ...	122
——— *v.* Mackie, ...	138
——— *v.* Glencross, ...	105
DesBrisay, Doherty *v.*	497
Dibble, Dow *v.*	55
Dickinson, Connell *v.*	459
Disbrow, Frost *v.*	73
Doe *ex dem* Armstrong *v.* Bridges, ...	490
——— Connell *v.* Dickinson, ...	456
——— Estabrooks *v.* Humphreys, ...	104
——— Grant *v.* Boyne, ...	432
——— Hickman *v.* King, ...	330
——— Levi *v.* Samuel, ...	265
——— McGowan *v.* McColgan, ...	533
——— Robinson *v.* Chassey, ...	50
——— Shore *v.* Gearon, ...	144
——— Trider *v.* McIntosh, ...	505
Doak *v.* Robinson, ...	279
Doherty *v.* Desbrisay, ...	497
Dow *v.* Dibble, ...	55
Duplissey, Moffat *v.*	21
Duvaney, Regina *v.*	581
E	
Estabrooks *v.* Humphreys, ...	103
Evanson, Wright *v.*	232
F	
Fairley, McMillan *v.* 325	504
Ferguson, Allen *v.*	149
——— St. Andrews Church *v.*	273
Floyd, Wiggins *v.*	229
Foley *v.* Tucker, ...	52
Foshay *v.* Barnes, ...	452
Foster, Jones *v.*	607
Fredericton Boom Co., McPherson *v.*	336
——— Godard *v.*	544
Frost *v.* Disbrow, ...	73
——— *in re*	127
G	
Gandy *v.* Staples, ...	627
Gearon, Shore *v.*	144
Getty McElroy *v.*	261
Gilbert *v.* Stockton, ...	58
——— Gourley *v.*	80
——— *v.* Campbell, ... 258	474
——— Murray *v.*	553
Gifford *v.* Queen Insurance Co.	432
Gilpin *v.* Scovil, ...	379
Glencross, DesBrisay *v.*	105
Godard *v.* Fredericton Boom Co.	544
Godfrey *v.* Oglesby, ...	233

page

Goodfellow, Harley v. 335
Gourley v. Gilbert, ... 80
Grant v. Boyne, ... 432
Green, Vanbuskirk v 25
——— v. Mayor, &c., St. John, ... 531
Gregory, Ranney v. 152

H

Hallett, Hendricks v. 185
——— Hendricks v. 170
——— Shepherd v. 43
Hamilton, Stevens v. 335
——— v. Bryson, ... 629
——— Dalton v. 422
Hammond, Regina v. 33
Sirois v. 332
Hanson, Leslie v. 263
Harley v. Goodfellow, ... 335
——— Rankine v. 271
Harris v Mitchell, ... 2
Harrigan, Byers v. 230
Hartt, Alexander v. 161
Hazleton, Valentine v. 110
Hendricks v. Hallett, ... 170 185
Hickman, Outhouse v. 38
Hickman v. King, ... 330
Hitchcock, Baldwin v. 310
Hodge v. Reid, ... 89
Hornbrook, Wilson v. 167
Hoyt v. Stockton, ... 327
Humphreys, Estabrooks v. 104
Hunter v. Maddox, ... 162
——— *in re*, ... 233
——— Ruel v. 618
Hutchison, Tozer v. 548

J

Jardine *ex parte*, ... 582
——— v. McWilliams, ... 589
Johnston v. McCartney, ... 220 227
Jones v. Foster, ... 607
——— v. Steeves, ... 200
Justices Westmorland, Regina v. 472

K

Keith v. Skinner, ... 595
Keiver, Turner v. 91
Key v. Thomson, ... 295
Kinnear v. Robinson, ... 568
King, Hickman v. 330

L

Lawlor v. Potter, ... 328
Leary v. Armstrong, ... 22
Letson, Rankine v. 29
Leslie v. Hanson, ... 263
Levi v. Samuel, ... 265
Light, Abell v. 97 240
Lingley v. the Queen Insurance Co. 280
——— v. Smith, ... 600

Mc

McCaffrey, Armstrong v. 525
McCartney, Johnston v. 220 227
McColgan, McGowan v. 542
McDonald v. Watt, ... 24
McElroy v. Getty, ... 261
McElveney v. McKilligan, ... 322
McIntosh, Trider v. 505
Regina, v. 372
McGowan v. McColgan, ... 542
McKenzie v. Seaman, ... 632
——— v. Wiswell, ... 511
McKilligan, McElveney v. 322
McLeod, DesBrisay v. 122
——— v. Comrs. E. & N. A. R. 584
——— v. Carman, ... 602
——— Thomas v. 598
McMillan v. Fairley, ... 325 504
McNichol v. Peck, ... 430
Macpherson v. Fredericton Boom Co. 336
McWilliams, Jardine v. 589

M

Mackie, DesBrisay v. 138
Maddox, Hunter v. 162
Mahoney v. Provincial Insurance Co. 633
Mayor, &c., St. John, Coram v. 443
——— Green v. 531
Miles v. Coy, ... 174
Miller v. Weldon, ... 376
Mitchell, Harris v. 2
——— Rankine v. 490
Moffatt v. Duplissey, ... 21
Murray v. Gilbert, ... 553

N

Noble v. Temple, ... 274

O

Oglesby, Godfrey v. 233
Oulton v. Scovil, ... 502
Outhouse v. Hickman, ... 38

P

Peck v. Barbarie, ... 523
——— v. Lingley, ... 418
——— McNichol v. 430
Pelton v. Temple, ... 274
Pickett v. Pickett, ... 156
Pickett v. Perkins, ... 131
Potter, Lawlor v. 283
Pourrier v. Raymond, ... 520
Preston v. Simonds, ... 44
Price, Condell v. 332
Povincial Insurance Company, Mohoney v. 633

Q

Queen Insurance Company, Lingley v. 280
——— Smith v. 311
——— Gifford v. 432

R

page

Rankine v. Letson, ... 29
——— v. Mitchell, ... 499
——— v. Harley, ... 271
Ranney v. Gregory, ... 152
Raymond, Pourrier, v. 520
Regina v. Assessors of Kings County, ... 528
——— v. Com. of Germantown Lake, ... 431
——— v. —— of Sewerage, &c., St. John, .. 3
——— v. Chandler, ... 556
——— v. Cregan, ... 36
——— v. Duvaney, ... 581
——— v. Hammond, ... 33
——— v. Justices of Westmorland, ... 472
——— v. McIntosh, ... 372
——— v. Ryan, ... 116
——— v. Simpson, ... 32
——— v. Sparrow, ...113 237
——— v. Steadman, ... 368
Reed v. Weldon, ... 460
Reed Hodge v. 89
Rideout v. Stevens, ... 28
Robinson, Bishop v. 68
——— Doak v. 269
——— Kinnear v. 568
——— v. Chassey, ... 50
Rose v. Belyea, ... 109
Ruel v. Hunter, ... 618
Ryan, Regina v. 116

S

St. Andrew's Church v. Ferguson, ... 273
St. George's Church v. Cougle, ... 620
Samuel, Levi v. 265
Scovil, Gilpin v. 379
——— Oulton v. 502
Seaman, McKenzie v. 632
Sharp, Alward v. 286
Shepherd v. Hallett, ... 43
Shore v. Gearon, ... 144
Skinner, Keith v. 595
Simonds, Preston v. 44
Simpson, Regina v. 32
Sirois v. Hammond. 332
Smith, Taylor v. 120
——— v. Queen Insurance Company, ... 311
——— Lingley v. 600
Spence v. Trenholm, ... 77
Sparrow, Regina v. 113 237
Staples, Gandy v. 627

page

Steadman, Regina v. 368
Stevens v. Hamilton, ... 334
——— Rideout v. 28
——— Jones v. 260
Stockton, Gilbert v. 58
——— Hoyt v. 327
Street *ex parte*, ... 106

T

Taylor v. Smith, ... 120
——— Wasson v. 102
Temple, Noble v. 274
——— Pelton, v. 274
Thomson, Key v. 295
Thomas v. McLeod, ... 598
Tibbetts, Tompkins v. 317
Tingley Peck v. 418
Tompkins v. Tibbetts, ... 317
Tozer v. Hutchison, ... 548
Travis *ex parte*, ... 30
Trenholm, Spence v. 77
Trider v. McIntosh, ... 505
Tucker, Foley v. 52
Tupper, Woodstock Railway Company v. .. 457
Turner v. Keiver, ... 91

V

Valentine v. Hazleton, ... 110
Vanbuskirk v. Green, ... 25
Vincent v. West, ... 290

W

Wallace v. Woods, ... 230
Wasson v. Taylor, ... 102
Watt, McDonald v. 24
Weldon, Miller v. 376
——— Reed v. 460
West, Vincent v. 290
Westmorland Bank, *in re*, ... 514
Wheeler, Campbell v. 269
White v. Barton, ... 1
Wiggins v. Floyd, ... 229
Wilson v. Hornbrook, ... 167
Williston, Commercial Bank v. 283
Wiswell, McKenzie v 511
Woods, Wallace v. 230
Woodstock Railway Company v. Tupper, .. 457
Wortman v. Ayles, ... 63
Wright v. Evanson, ... 232

The great St. John fire of the 20th June, 1877, having destroyed the whole edition of Hannay's Reports, including every copy, with three or four exceptions, in the possession of the Bar of St. John, I made application to the Provincial Government for a grant to aid in their republication. This application was indorsed by His Honor Chief Justice Allen and was handsomely responded to by the Government. The result is these volumes which are now reprinted, with some corrections. The new edition is commended to the Profession as a considerable improvement on its predecessor.

JAMES HANNAY.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NEW BRUNSWICK,

IN HILARY TERM,

IN THE THIRTIETH YEAR OF THE REIGN OF QUEEN VICTORIA.

WHITE *v.* BARTON.

FEBRUARY 5th.

Service of a rule to discontinue, without payment of the costs, will not prevent the defendant from obtaining judgment as in case of a nonsuit.

Curry moved for judgment as in case of a nonsuit, on the ground that the plaintiff had not proceeded to trial according to the practice of the Court.

H. B. Rainsford opposed the motion on an affidavit of the plaintiff's attorney, stating that he had obtained a rule to discontinue on payment of costs; which rule had been served on the defendant's attorney before notice given of this motion. He contended that after service of the rule to discontinue, the defendant was not in a position to move for judgment.

Per Curiam. (WILMOT AND ALLEN, JJ.)—The suit is not discontinued until the costs are taxed and paid, and there is nothing to show that this has been done. The mere service of a rule to discontinue amounts to nothing. The motion must be granted.

Rule accordingly.

HARRIS *v.* MITCHELL.

FEBRUARY 6th.

Defendant being about to leave the Province, gave a power of attorney to an agent, authorising him to appear to and defend any action that might be brought against the defendant during his absence. A suit was commenced, and a copy of the writ sent to the agent, who declined to appear. Held, that the agent was not bound to appear, and that interlocutory judgment signed for want of appearance was irregular.

This was an application to set aside interlocutory judgment signed for want of appearance, made before ALLEN, J. at Chambers, and was by him referred to the Court. The defendant left the Province for England in July last, and previous to his departure executed a power of attorney to his brother, James Mitchell, Sheriff of Northumberland, containing among other things the following clause: "and for me, and in my name to appear to and defend any action, "suit or other proceedings that may be sued out or proceeded with "against me, during my absence." During the defendant's absence, the plaintiff's attorney sued out a writ against him, and enclosed a copy of it to James Mitchell, the agent, who acknowledged that he had received it, and said he would consult his legal adviser about it. No appearance having been entered, interlocutory judgment was signed.

Stratton now moved to set aside the judgment, on the ground that there had been no service of process on the defendant.

G. Botsford, contra. The authority given by the defendant to his brother, places the latter in the same position as the defendant himself, and service on the agent is as good as service on the defendant himself. The agent was bound to act under the authority. [RITCHIE, C. J.: Is this any stronger than a bond and warrant of attorney would be; suppose the attorney refused to act, could you compel him?] There is a distinction between such a case and the present. [ALLEN, J.: It was only an authority to James Mitchell, under which he could appear or not, just as he pleased.] The intention of the defendant was to provide for the defence of suits that might be comenced against him in his absence; and the agent was bound to appear. [WILMOT, J. There are only two ways of serving a writ—personal service, and service at the defendant's dwelling-house. If you have not complied with either requisite, you cannot make it good service.] Here is an authority distinctly given, under which the agent was bound to act. [RITCHIE, C. J.: Suppose defendant had given his brother authority to accept all bills of exchange drawn on him during his absence; could that be construed into an actual acceptence? The plaintiff here is attempting to avail himself of a power to which he was no party.] This was not a mere

power; it was a substitution of the agent in the defendant's place, for the purpose of defending suits.

Per Curiam. To enable a party to obtain interlocutory judgment he must show that he has made such a service of process as the law requires. The plaintiff cannot avail himself of any power as between the defendant and another party. The power of attorney does not authorise the service of writs upon the agent; if it had, the case might have been different.

The judgment must be set aside, but under the circumstances, without costs.

Rule accordingly.

THE QUEEN *v.* THE COMMISSIONERS OF SEWERAGE, &C., OF THE CITY OF ST. JOHN.

FEBRUARY 8th.

The Act 2 Wm. 4, c. 26. incorporating the St. John Water Company, authorized them to draw water from, erect reservoirs on, and carry pipes through private property, provided that no such water should be drawn, &c., without compensation being paid for the use of the same, and for any damage sustained by the operations of the company, and in case of disagreement between the company and the owners of the land, the compensation to be determined by arbitration; and if the owner of the property should decline to appoint an arbitrator, the Supreme Court, on application of the company, should issue a warrant to the Sheriff to summon a jury to assess the amount to be paid.

By Act 12 Vict., c. 51, further powers were given to the company to enter on private property, erect dams, and draw water from any stream, on paying compensation to the owners—the amount to be determined as by the Act 2 Wm. 4, c. 26. After the passing of this Act, the Water Company erected a dam upon a stream flowing through private property, laid down pipes and diverted the water from its natural channel, without the consent of the owners.

By Act 18 Vict., c. 38, all the property, rights, powers and privileges of the Water Company were vested in Commissioners appointed under this Act, saving to all parties all rights, remedies and actions for any act done, or for any contract theretofore made, and giving the Commissioners power to lay down pipes, &c., for extending the supply of water; and providing that in case of damage done in the execution of the works, the Commissioners should pay the party sustaining the same, such compensation as should be agreed upon, and in case they could not agree, the Commissioners should, on request of such party, apply to a Justice of the Peace for a warrant to the Sheriff to summon a jury to assess the damages. The Commissioners continued the obstruction placed on the stream by the Water Company, and laid down additional pipes, drawing off a much larger quantity of water.

A, claiming as one of the heirs of the former owner, then gave notice to the Commissioners that he claimed damages under the Act 2 Wm. 4, c. 26, and the several

Acts in amendment and incident thereto, for abstraction of the water by the Commissioners, and requested them to take the necessary steps for summoning a jury to assess such damages. The Commissioners declined to take any steps, and A gave them a further notice, stating that they had refused to agree upon the amount of compensation for obstructing the stream and diverting the water, and requiring them to take the necessary and legal steps pointed out by the Acts 2 Wm. 4, c. 26, 12 Vict., c. 51, and 18 Vict., c. 38, or any of them, for determining the amount of compensation to be paid for all or any damage which he was entitled to receive in his own right, or in behalf of the other heirs, as well for the acts of the St. John Water Company as of the said Commissioners. The Commissioners declined to take any proceedings on this application, stating that they were not aware that any damage had been done to A by their operations. Held, on application by A for a mandamus—

1.—That the Commissioners were right in refusing to act on the first notice—the mode of proceeding under the Acts 2 Wm. 4, c. 26, and 12 Vict., c. 51, being by arbitration, and not by a jury.

2.—That the Commissioners had no power to act under the 2 Wm. 4, c. 26, even if they had been requested to take the proceedings pointed out by that Act.

3.—That as all rights and remedies against the Water Company were preserved by the 18 Vict., c. 38, the Commissioners were not bound to apply for a jury to assess damages for the acts of the Water Company, as required by the second notice.

4.—That without shewing who the other owners of the property were, and how A was entitled to claim on their behalf, a mandamus could not be issued to assess the damages due to them, but must be confined to A's interest in the land.

5.—That it was sufficient for A to show by his affidavits a *prima facie* case of title to the land, and that he need not produce his deeds.

6.—That the allegation of the withdrawal from its natural course of a large quantity of water from a stream flowing through A's land, showed a *prima facie* case of damage to him.

7.—That a demand in the alternative, to do one of two things, and a general refusal, was sufficient to found an application for a mandamus, if the applicant was entitled to part of what he claimed.

8.—That a request to a public officer, to take the necessary and legal steps pointed out by an Act of Assembly, to assess damages for an injury done to the applicants property under the authority of the Act, was sufficiently specific.

9.—That an objection that there had been no sufficient demand could not be taken after the merits of the application had been discussed.

10.—That where an application for a mandamus fails, because there was no demand and refusal, it cannot, as a general rule, be renewed after a demand; though there may be circumstances warranting a departure from this rule.

This was an application for a mandamus, to the Commissioners of Sewerage and Water Supply of the City of St. John, to compel them to proceed under the Act 18 Vict., c. 38, to assess the damages claimed by the applicant, Amos E. Botsford, in consequence of the works of the Commissioners in carrying out the provisions of the Act. The facts are fully stated in the judgment of the Court.

A rule *nisi* having been granted in Easter Term last,

Watters, Q. C., shewed cause in Trinity Term last, and *A. R. Wetmore*, Q. C., was heard in support of the rule.

RITCHIE, C. J., now delivered the judgment of the Court.

The affidavits on which the rule was moved, set forth that Sarah L. Botsford, the mother of Amos E. Botsford, was owner in fee of a lot of land in the Parish of Simonds, containing a mill site, &c. That in the year 1824, Sarah L. Botsford and her then husband, the late Honorable William Botsford, entered into the actual possession of the aforesaid land and premises and all the rents and profits thereof; that a natural stream of water, called Little River, ran through and across the said lot, having within its boundaries, natural falls of water about one hundred feet in height, of great value for mill and manufacturing purposes, near the City of St. John, and over which falls the water of said river and all its tributaries had, from time immemorial, been accustomed to flow and pass over without diversion or obstruction; that Sarah L. Botsford died on the 4th of May, 1850, leaving the said William Botsford her surviving, and a number of heirs, as tenants in common, of whom the applicant, Amos E. Botsford, is one. That on the 8th December, 1837, by indenture between William Botsford and Sarah L. Botsford of the one part, and John Duncan of the other part, the said premises were leased for the term of fourteen years from 3rd May, 1838; and that on the 6th June, 1853, William Botsford by deed poll renewed the said lease to the assignees thereof for fourteen years. That in the year 1850 or 1851, the St. John Water Company, without the consent of the said William Botsford, the tenant by the courtesy, or of the said Amos E. Botsford or of any of the heirs of the said Sarah L. Botsford, for the purpose of diverting the waters of Little River from its natural channel, caused certain obstructions to be made in and upon Little River, about one mile and a half above the mill and erections which had been put up for the purpose of manufacturing; that on the 26th March, 1851, William Botsford forbid the said Water Company from diverting, by any way or means, the water from Little River, or preventing its flowing in the natural channel through the said lot, holding them responsible for all damages and losses already incurred, or that might thereafter be incurred; that after service of such notice, and in disregard thereof, the said company proceeded to put a dam across the river, and a twelve-inch main into said dam, and did divert a large quantity of water from its natural channel. That some time in the year 1853, as the said Amos E. Botsford was informed and believed, the Water Company leased a lot of land below the said dam to Thomas A. Phillips, for twenty-one years from 1st July, 1851, at a yearly rent

of £40, together with the right of active power to be obtained from a sluice-way opening into the said dam, which sluice-way was built by, and under the control of the said Phillips; that some time in the year 1854, the dam and mills so erected by the said company were damaged and partially carried away, and from that time to the present have been repaired, kept up, and added to by the Commissioners of Sewerage and Water Supply, &c. That during the year 1857 the said Commissioners, without the consent of William Botsford, or Amos E. Botsford, laid down a twenty-four inch main into or from the said dam or reservoir, by means of which, together with the twelve-inch main, they have a present capability of withdrawing from the waters of said Little River 5,500,000 Imperial gallons of water every twenty-four hours, as stated in their printed report for 1857. That the said 5,500,000 gallons of water, if allowed to flow down the said river to the said falls, might be made equivalent, as estimated by C. Walker, an eminent civil engineer, to about one hundred and sixty horse-power at the mills, at the foot of the falls. That at the time of laying down the twenty-four inch main in 1857, the level of the twelve-inch main was changed by the Commissioners at one place, by which a greater and more rapid flow through it was caused, equal deponent believed, to about double the quantity drawn off before such alteration. That on the 28th February last, the said Amos E. Botsford caused a copy of a paper (A) to be served on the Commissioners. This paper was signed by Amos E. Botsford, and after stating that the Commissioners and he had failed to agree upon the amount of compensation to which he claimed to be entitled for damages sustained for water taken from Little River, requested the Commissioners to take the necessary steps for summoning a jury to assess the damages he claimed, adding: "I claim to have my damages assessed under each of the following named Acts of Assembly: Act 2 Wm. 4, c. 26, entitled 'An "Act to incorporate sundry persons by the name of the St. John "Water Company,' and the several Acts in amendment and incident "thereto: the damage I claim is, for abstraction of the water by the "Commissioners, which water, but for such abstraction, would have "flowed down Little River through and along my property, which "property is situated on Little River." To which a reply (B) declining to take steps for summoning a jury in accordance with his request, was received from the Commissioners on the 17th March last. That on the 17th March, Amos E. Botsford caused a copy of a paper (C) to be served on the Commissioners. To which the Commissioners, by their solicitor, replied by letter (D). "That the "Commissioners are not aware that any damage whatever has been "done to Mr. Botsford by any of the operations of the said Com-

"missioners, and they therefore decline to take any steps as required "by his letter of the 17th March." That by a deed of partition between the heirs of the said Sarah L. Botsford, dated prior to the 24th of February, and some time during the summer of 1865, all the other heirs remitted and acquitted unto Amos E. Botsford all right and title to the said lot of land, except their right to damages occasioned by the said obstruction on the said Little River, which were expressly reserved, and when recovered, to be divided amongst the said heirs, in proportion to their several claims in the said estate of the said Sarah L. Botsford. That William Botsford died 8th May, 1864, after which Amos E. Botsford became the owner of the unexpired term of the said lease, by virtue of an arbitration between him and the said Commissioners, who had purchased the same from the holders of the said lease, some time previous to the death of the said William Botsford, for the purpose, as he, the said A. E. Botsford believed, of preventing any legal steps being taken by the holders of said lease against the unlawful acts of said Commissioners in diverting the waters of said stream.

On the part of the Commissioners, the affidavit of the chairman, E. E. Lockhart was produced, setting forth that in Michaelmas Term, 28th Victoria, an application was made for a mandamus, to compel the defendants to take necessary steps to ascertain the amount of compensation which should be paid to the owners in fee of a certain lot of land in the Parish of Simonds, situated on the north side of the new Loch Lomond road, so called, known and distinguished as lot No. 3, Class E, on the Schedule annexed to a certain deed of partition dated 12th November, 1824, and made between the heirs of the late Hon. William Hazen, for damages caused thereto by the operations of the St. John Water Company, and by the said defendants. That the application was made on behalf of Frances E. Murray, Ellen Murray, Amos E. Botsford, Chipman Botsford, Le Baron Botsford, Sarah Ann Hazen, and Blair Botsford, then alleging themselves to be the owners in fee simple, as heirs, or grantees of the heirs, of the late Sarah L. Botsford. That a rule *nisi* was granted, returnable on the second Saturday in said term, and a copy served on the deponent, by which the Commissioners were ordered to show cause why a mandamus should not issue, to compel them to take the necessary steps under the provisions of the several Acts of Assembly respectively, viz:—2 Wm. 4, c. 26; 12 Vict. c. 51; 18 Vict., c. 38; some or one of them, and all Acts in amendment thereof, to ascertain the amount of compensation which should be paid to the owners in fee of a certain lot of land, for the use and convenience of the said lot of land, and the damage caused thereto by the operations of the said St. John Water Company, in laying

down a certain main or conductor, in and through the same, in the year 1851; also for the use and convenience of the same lot, and damage caused thereto, by the operations of the Commissioners of Sewerage and Water Supply, &c., for the time being, in laying down a certain other main or conductor in 1857, in and through the said lot of land. That cause was shown on behalf of the said defendants against the said rule, and the same was discharged in Easter Term 1865, on the ground that there had been no request to the said defendants to apply to a Justice of the Peace for a warrant to summon a jury, and no absolute refusal on the part of the said defendants.

The St. John Water Company was originally incorporated under the 2nd Wm. 4, c. 26; and by the 15th Sect. full power and authority was given to the company to draw water from, erect reservoirs on, and to carry pipes or conductors through (when such should be deemed absolutely necessary for the conveyance of water to the City of St. John by the said Corporation), the private property of individuals, whose lands might lie at the source, or in the line the said Corporation should think it expedient to convey the water from, or through which it might be necessary to carry such pipes or conductors, or erect such reservoirs; provided always, that no such water be drawn, reservoirs erected, &c., without a reasonable and proper compensation being allowed and paid, for the use and convenience of the same, and for any damage sustained by the operations of the company, to be agreed upon by the Corporation and the respective owners of such private property; and in case of disagreement, compensation to be determined by three arbitrators, one to be chosen by the Corporation, and one by the owners of the land, which two arbitrators should choose a third; and in case of their not agreeing in such choice within ten days after their appointment, then the Lieutenant Governor, upon application of the Corporation, to appoint the third arbitrator: the award of such arbitrators, or any two of them, to be final and conclusive. In case the owners of such private property should decline making such agreement, or appointing such arbitrator, then the Corporation might apply to the Supreme Court, and such Court was empowered to issue a writ or warrant to the sheriff of the City and County of St. John, requiring him to empanel twelve disinterested freeholders, which jury, upon their oaths, should "inquire of, assess, and ascertain the distinct sum or sums of money, or annual rent to be paid for the use "and convenience of such private property, or the indemnification "to be made for the damage that may or shall be sustained." The inquisition to be returned and filed in the office of the Clerk of the Pleas, and to be final and conclusive between the parties; the costs

and expenses to be taxed by the Supreme Court, and to be borne by the Corporation.

The next Act is the 12th Vic., c. 51, entitled "An Act to increase "the Capital Stock of the St. John Water Company, and to provide a "more efficient supply of water in the City of St. John." By the 6th Section of this Act, the company are authorized, for the purpose of enabling them to procure a more efficient supply of water, to enter upon private property for the purpose of procuring such supply, and there build dams or embankments on any brook, stream, &c., for the purpose of creating artificial ponds or reservoirs, and thereby to cause the flowage of such private property, and continue such flowage so long as they shall see fit; with full power to draw water from such artificial ponds or reservoirs exclusively, and to carry pipes or conductors through the private property of individuals, as may be necessary for the conveyance of said water to the city of St. John; provided that no such dam, &c., be built, ponds or reservoirs made, flowage created, or pipes, &c., laid down through private property, without a reasonable and proper compensation being allowed and paid for the use and convenience of the same, and for all damage sustained by the operations or works of the company, to be agreed on by the said company and the respective owners of such private property; and in case of disagreement, then such compensation to be settled in the manner prescribed by the Act 2 Wm. 4, c. 26, or, as may be prescribed by any future Act to be passed; and for all damage the owner or owners of any mills, or other manufacturing establishments may sustain, for or by reason of any of the operations of such company, the direct and indirect damage, as well present as future, shall be fully considered, and on any investigation under the Act for ascertaining the same, any such owner or owners may be examined under oath touching or concerning such injury or damage. This Act was amended by 13th Vict., c. 7, (Local); by the 15th Vict., c. 71, and by the 16th Vict., c. 53; but such amendments had no reference to interfering with private property or compensation.

The 18th Vict., c., 38, provides for an improved system of sewerage and water supply of part of the City of St. John and Parish of Portland. Three Commissioners were appointed under this Act; and by Sect. 6 the entire property, works, revenues, rights and credits of the St. John Water Company became vested in the Commissioners, with all the powers and privileges held and enjoyed by the company; saving however to all and every person or persons, company or corporation, all legal rights and remedies in law or equity, and all actions or suits then pending or thereafter to be brought against the said company, for or by reason of any malfeas-

ance or misfeasance, or any act or thing theretofore done or committed, for and by reason of any covenant, contract or agreement theretofore made; which rights and remedies shall continue, and the actions and suits be brought, prosecuted and ended as if this Act had not been passed; and the stockholders in said company shall be liable in law and equity for the liquidation and payment of all such claims and damages recovered, or to be thereafter recovered therefor, provided that such claims and damages shall not be levied on any stockholders on account of any preference stock, unless the value received by the holders of the original stock on account of such original stock shall be insufficient to pay the same. And by Sect. 15, in the event of any damage being done in the execution of the works contemplated by the Act, the Commissioners shall pay to the party sustaining the same, such compensation as may be mutually agreed on, and in case the parties and Commissioners shall not agree, it shall be the duty of the Commissioners at the request of such party, to apply to some one of the Justices of the Peace for the City and County of St. John for a warrant, which warrant such Justice is authorized and required to issue, commanding the sheriff or any constable to summon a jury of five disinterested freeholders or occupiers of land in said City and County, to assess the damages to be paid to the party complaining. The jury shall be sworn, and the sheriff or his deputy shall preside at such inquest, and the verdict shall be binding as well on the party complaining as on the Commissioners, who shall within ten days thereafter pay to such party the amount assessed: the costs to be taxed by the sheriff or his deputy as on ordinary inquests held by the sheriff, and be equally borne by the Commissioners and party complaining, whose moiety shall be deducted and retained out of the amount of damages assessed.

It is not, and cannot be questioned, that this Court has the power to interfere by mandamus, and compel companies empowered by Act to take (and who do take) land or otherwise interfere with the rights of private property, to make compensation in such way as the Act directs. What the Legislature has empowered these Commissioners to do, and compelled them to do and submit to, as well with reference to the interests of the public as with reference to the interests of individuals, is not left in doubt. If individuals are damnified by their acts, and they refuse to proceed in the course prescribed by law, the writ of mandamus, in the absence of any other efficient remedy, is a suitable and proper process by which they may be compelled; for it is unquestionable that when an Act of Parliament gives power to do some particular act or duty, and provides no specific legal remedy on non-performance, the Court of Queen's Bench in England, and the Supreme Court in this Province,

will, in order to prevent a failure of justice, grant *ex debito justicæ*, a mandamus to command the doing of such act or duty; and in the language of Lord Denman in Reg. *v.* the Exeter Railway Company —"there is no higher duty cast upon this Court, than to exercise a "vigilant control over persons entrusted with large and extensive "powers for public purposes, and to enforce, within reasonable "bounds, the exercise of such powers, in compliance with such pur-"poses." The applicant in this case claims for damage done by the Water Company, and for damage done by the Commissioners, and his claim is on his own behalf, and on behalf of certain other heirs of the late William Botsford. The first request shown by the affidavits, is dated the 24th Feb., 1866, and is in these words, after averring a failure to agree, "I have to request you will take the "necessary steps for summoning a jury to assess the damages I "claim. You will understand, I claim to have my damages assessed "under each of the following named Acts of Assembly:—First, the "Act 2 Wm. 4, c. 26, entitled, 'An Act to incorporate sundry persons "by the name of the St. John Water Company,' and the several Acts "in amendment and incident thereto. The damage I claim is for "abstraction of the water by the Commissioners, which water, but "for such abstraction, would have flowed down Little River, so called, "situate in the Parish of Simonds, in the County of St. John, through "and along my property, which property is situate on Little River, "so called." The Commissioners declined to take steps for summoning a jury in accordance with this request, and, we think, rightly so. In the first place, the mode of proceeding under the Act named, and the Acts in amendment thereof, was not by summoning a jury, but by proceeding to arbitration; and failing that, by application to the Supreme Court to issue a writ. But, supposing they had been requested to adopt the course pointed out, they had no power to act under the 2 Wm. 4, c. 26, and consequently had no power to arbitrate in the manner specified, or to apply to the Supreme Court. This claim, it will be observed, is confined to the damage occasioned by the abstraction of water by the Commissioners, and to the injury sustained by himself.

The second request, dated 16th March, 1866, goes much further. After referring to the same proposal "to enter into an arrangement as to the amount of compensation for damages sustained for water taken from Little River by the Commissioners"—which it alleges the Commissioners would not entertain—it claims compensation for certain works and obstructions made and erected in and upon Little River, so called, in the Parish of Simonds, thereby diverting its water by the St. John Water Company, under, as they allege, the provisions of the Acts of Assembly 2 Wm. 4, c. 26, and 12 Vict.,

c. 51; also, compensation for certain other works and obstructions made and erected in and upon the said Little River, and diversion of the water thereby, by the Commissioners for the time being appointed under the provisions of 18 Vict., c. 38; and then proceeds to require the Commissioners to take the necessary and legal steps pointed out in the said Acts of 2 Wm. 4, c. 26, 12 Vict., c. 51, and 18 Vict., c. 38, one or all of them, or of any other Act or Acts in amendment thereof, or addition thereto, for determining the amount of compensation to be paid for all, or either, or any damage which, as the owner of certain property situate on the said Little River, below the said obstructions in the Parish of Simonds, comprising a mill privilege and other riparian rights and privileges, I am entitled to receive, in my own right, or on behalf of the other heirs of the late Sarah L. Botsford, as well for the acts and doings of the said St. John Water Company, as for the said Commissioners, in the premises."

To this application, the Commissioners, through their attorney, state that "they are not aware that any damage whatever has been done to Mr. Botsford, by any of the operations of the said Commissioners, and they therefore decline taking any steps as required by his letter." The Commissioners pass over unnoticed the claim for damages occasioned by the Water Company, and also that on behalf of the "other heirs." As to the first of these it is quite clear that if Mr. Botsford had any claims, legal or equitable, for the acts of the Water Company, they are preserved to him against the company by the 18th Vict., c. 38, by which also provision is made for realizing the same against the stockholders, to the extent of the debentures handed to them on the vesting of the company's property in the Commissioners, and which the legislature doubtless considered amply sufficient. At any rate, we can find nothing in the Act, whereby the Commissioners are made liable for the acts or doings of the company, and certainly nothing to warrant the issuing of a mandamus to take steps for summoning a jury under the 18th Vict. c. 38, to assess damages done by the Water Company under 2 Wm. 4, c. 26, and 12 Vict., c. 51. As to the other claims on behalf of the other heirs, we will deal with that in considering the defendant's objections to the application; but as regards Mr. Botsford's individual claim for the acts of the Commissioners, we think the Commissioners did not assign a good and sufficient reason for their refusal. Their not being aware of any damage, might be a very good reason for not agreeing to an amount of compensation, and was therefore, in our opinion, just the reason why they should take steps in summoning a Jury to assess the damages. It was obviously not the intention of the Legislature, that the Commissioners should be the sole judges as to whether damage or no damage had been done; and they do not say

that no damage has been done, but simply, that they are "not aware" of any. This may be strictly true, and yet Mr. Botsford's property may have been seriously damnified by operations done by them in the execution of the work.

This would seem to be just the case for a Jury. The owner claims damages;—the Commissioners are not aware of any damages; they consequently cannot agree on any amount to be paid; and a Jury is summoned, who have power to inquire and assess the damages; but only in case they are satisfied the claimant has sustained damage; the burthen of showing which, is of course, on the claimant. This application is not met in the present instance by any facts touching the merits of the case, but rather on the insufficiency or defective statement of the plaintiff's case.

Six objections were taken in shewing cause—

1. That the subject matter of the present application had been substantially adjudicated on and disposed of, in Easter Term 1865.

2. That no specific demand was shewn to have been made to the Commissioners, to apply to the Justices of the Peace for a warrant.

3. That the applicant showed title out of himself of the property in question, by a lease and renewal thereof unexpired; and did not show how he was entitled, or that he was in possession at the time of making the application; and that he should have shewn his title by actual documents.

4. That he had not shewn any damage.

5. That the claim being on behalf of the applicant and of the other heirs, and the rule being to pay to the owners in fee, the title must be clearly set forth.

6. That the applicant did not state that he was authorized to apply on behalf of the other heirs.

As to first point—looking at the copy of the rule which was discharged in Easter Term, 1865, it is difficult to say that this is not substantially the same application. The practice which governs the Queen's Bench seems very clearly establised; viz: "that parties must "come prepared with the proper materials in the first instance." Reg. v. Pickles, (3 Q. B. 601.) and that a party once failing in consequence of a defect in the way in which he brings his case forward, is not entitled to renew the same application; and Lord Denman in Reg. v. the Manchester and Leeds Railway, (8 A. & E. 427,) says, "The rule of practice, if not altogether universal and inflexible, is "as nearly so as possible, that the Court will not allow a party to

"succeed on a second application, who has previously applied for the "very same thing without coming properly prepared." * * * Adding—"I think that every party is to come at first fully prepared "with a proper case, and if he fail to do so, must not afterwards "renew the application with an amended case." The principle laid down in this case was affirmed in Reg. v. The Great Western Railway Company (5 Q. B. 601) the exception being where "the alteration "would be simply in the form of a title or jurat, and reswearing the "affidavit would clearly leave parties in the same situation in which "they were before." The case of *ex parte* Thompson (6 Q. B. 721) is still more directly in point. That was an application for a mandamus: a former rule had been discharged, on the ground that it did not appear that there had been a demand and refusal; since which, a demand had been made which had been virtually refused. It was contended that a fresh right had accrued which did not exist when the former rule was discharged; but, per Lord Denman, "We have "often refused rules on this ground: we cannot have the same appli-"cation repeated from time to time." But for this case, we should have thought that the want of a demand and refusal, if there had been none at the time of the application, would have occasioned a failure by reason of the want of an essential ingredient, not because materials actually existing had not been been brought forward, subjecting the party to the dismissal of his application with costs for prematurely applying, but that when he had materials which gave him a case and which did not exist, at the time of the former application, he would have a right to an adjudication on such new case.

In Bodfield v. Podmore, (5 A. & E. 785,) Lord Denman says, "If "a party have proper materials at the time of his first application, "and be not in a state of ignorance, he is not to make a new appli-"cation because he did not bring them forward at first. Nothing "could be more dangerous." But if the materials did not exist, and therefore could not be brought forward, the inference would be, that when they did exist he might bring them forward, unless indeed in the case of a demand and refusal. The materials were necessary rather to the application to the Court than to the establishment of the right, and he might have had them, and therefore ought to have had them. We are not aware that this Court has heretofore so stringently adopted the rule thus rigidly laid down. In the case before us, the injury complained of is continuous; the public are daily deriving benefit from the abstraction of the water. If this benefit is obtained in detriment of the applicant's property, and he is pecuniarily damnified thereby, he certainly ought to be compensated. However great the convenience and benfit to the public may be, they have no right to the enjoyment of it at the expense of an individual,

in opposition not only to a common principle of justice, but contrary to the declared intentions of the Legislature. To deprive the applicant of a just compensation by an arbitrary technical rule of practice, unless unquestionably and inflexibly established, would be a harsh application of a rule of practice, no doubt generally wholesome in its operation. That there may be circumstances warranting a departure from its arbitrary enforcement, we find intimated in Reg. v. The Great Western Railway Company, before cited, where Lord Denman questioning the case of Sherry v. Oke, (3 Dowl. 349,) says, "In that case, however, there were particular circumstances, such "as might induce the Court to exercise a power, which we do not "mean wholly to repudiate." This power, under the peculiar circumstances, and considering that applications for writs of mandamus have been heretofore of rare occurrence, and as it may be inferred from the judgment of the Court in the former application, in the expression of the hope that the opinion then expressed might lead to an arrangement, by which the claims of the heirs of Judge Botsford might be satisfied without the intervention of the Court, that the Court, as then constituted, did not consider that application as final and bearing in mind what was truly said by the same learned Judge in Reg. v. The Eastern Counties Railway Company (10 A. & E. 565,) that "we have no more right to refuse to any of the Queen's subjects "the redress which we are empowered to administer, than to enforce "against them such powers as the constitution has not confided to "us," in order to prevent a failure of justice, we feel disposed to exercise the power in this, as an exceptional case, though not without great hesitancy, and with the distinct intimation that we acquiesce in the propriety of the application in general, by this Court, of the rule which the Queen's Bench in England have, by experience, found to be convenient and sound.

As to the second point—it is no doubt an imperative rule of the law of mandamus, that previous to the making of the application to the Court for a writ to command the performance of any particular act, an express or distinct demand or request to perform it, must have been made by the prosecutor to the defendant, who must have refused to comply with such demand, either in direct terms, or by conduct from which a refusal can be conclusively implied, and both the demand and refusal must also be shown in the affidavits made use of in support of the application for the rule. This objection however must be taken in the first instance, at the outset of the argument in showing cause, and cannot be made after the merits have been discussed. The want of this indispensable preliminary compelled the court to refsue the application originally made. Mr. Botsford's letter of the 16th March 1866, appears to us to contain a

distinct specific demand for compensation, and a request to the Commissioners to take the necessary and legal steps pointed out for determining the amount of such compensation; and though it is true, the Commissioners were asked to do what they had no power to do, viz: to proceed under the Acts 2 Wm. 4, c. 26, and 12 Vict., c. 51, and to do so under these Acts and under the 18th Vict., c. 38, "on "behalf of the other heirs of Mrs. Botsford," without naming them, or showing any authority for making such a demand on their behalf, so far as these damages were concerned, we think there was no such demand as the Commissioners were bound to notice or act on. Still as we have independent of this, a demand of Mr. Botsford in his own right under the 18 Vict., c. 38, so that there was no difficulty in the Commissioners refusing compliance with the former and acceding to the latter, and as that Statute points out only one course for the Commissioners to adopt, by applying to a Justice of the Peace for a warrant, a request to them to proceed under the 18 Vict. amounted to a specific request to adopt that course, as was said by Patteson, J. in Rex. v. The Nottingham old Water Works Company, (6 A. & E. 369.) "It is clear we are not bound to refuse the mandamus altogether, "if we shall be of opinion that a part of the application may be "granted." We think a demand in the alternative to do one of two, three or more things, will if the duty enjoined form one of them, and there should have been a general refusal to comply with such demand, be sufficient.

As to the third point—by the affidavit, the lease from Judge Botsford and Mrs. Botsford would expire on the 3rd May, 1852. This lease the grantors had full power to make, but as it does not appear to have contained any covenant or agreement for renewal, no right is shown in Judge Botsford to renew it, or to lease again for any period beyond his own life; but if he had, the period for which it was renewed would expire on 3rd May, 1866, and in paragraph 17 is alleged, that after May 1864 the applicant became the owner of the unexpired term in said lease, by virtue of an arbitration with defendants themselves, who, it is alleged, had purchased the same from the holders, some time previous to the death of Judge Botsford; so that if there was a valid lease, binding on the heirs of Mrs. Botsford after the death of Judge Botsford, the interest in it is alleged to be in the applicant through defendants, and this they have not attempted to controvert. The applicant also shows that he is an heir of Mrs. Botsford, and so would be entitled, as tenant in fee, to an undivided interest. No doubt a party applying should show, on the face of his affidavits, sufficient facts from which the Court may be enabled to judge whether, on the statements disclosed, he has a right to the remedy sought—see Rex. v. Bishop of Oxford (7 East 345.)

We do not find in any of the cases, that the title deeds of the party are required to be produced. We think it sufficient if the applicant makes out a *prima facie* case, by laying such facts before the Court as will warrant them in presuming that the rights he claims, are in him. See Rex. v. Jotham (3 T. R. 577.) Here, the title of Mrs. Botsford is stated as derived from her father, as one of his heirs, and to which she became exclusively entitled by a deed of partition between the heirs in the year 1824, at which time she and Judge Botsford entered into the actual possession of the lands, in which possession, by themselves or their tenants, they continued and died; thus establishing a clear presumptive case of seizin in fee, which the defendants have not attempted to impugn, either when applied to themselves, or in answer to the present application. Had Mr. Botsford applied as sole heir, no possible objection could, in our opinion, have been raised to the mandamus going. It would only be in the alternative, either to execute the command of the writ, or to signify to the Court some reason to the contrary. If want of title or interest in Mr. Botsford is returned as a reason for not complying with the mandamus, the question will then be legitimately raised, and can, if necessary, be properly tried. Reg. v. Frost (8 A. & E. 825). There may be very considerable inconvenience in directing the assessment of the damages of an undivided interest, without specifying what the undivided interest is; leaving it to the jury to inquire into the extent of the applicant's title, which, if ascertained before the issuing of the writ, would leave to the jury the simple duty of assessing the damages that the claimant had sustained as tenant in fee, for life, or years, either of the whole, or of a specific undivided part, as the case might be, the writ guiding the jury as to the extent of the interest. Indeed, it would be more convenient perhaps, that all parties interested should apply at the same time, so that the Jury might establish the amount each would be entitled to receive; rather than have subsequent inquiries, resulting probably in different estimates, when all ought to be the same, though this inconvenience is no greater than if several persons should at law bring separate actions for damage to them growing out of one and the same trespass. The case of Rex. v. the Nottingham Old Water Works Company—(6 A. & E. 355)—shews that if the amount of damages is to be limited by the interest of the party in the property injured, that is a matter properly to be pointed out to the jury. Patteson, J., says, "Here the party has sustained a damage in respect of her land, "and if, in fact, it were one in respect of which the jury ought to "have limited her compensation, that should have been pointed out "to them at the time of the inquiry: and no complaint is made of "the chairman's summing up." We can discover nothing in the Act

28257

requiring a joint application. Sect. 15 declares that, "In the event "of any damage being done in the execution of the works contem- "plated by this Act, the Commissioners shall pay to the party sus- "taining the same, such compensation as may be mutually agreed on; "and in case the said parties and Commissioners should not agree, "it shall be the duty of the Commissioners, at the request of such "party, to apply, &c." So that when any individual feels himself agrieved, he has a right to call on the Commissioners, and if they decline, he has a right to compel, a fulfilment of their duty, without reference to the claims of other parties, with whom they may or may not have agreed, and whose claims may be identical in character, though separate and distinct in interest.

As to the fourth point, we think the applicant's affidavits show a sufficient *prima facie* case of damage to his land, unanswered in any way by the defendants. The owner of land has, by virtue of such ownership, a right to the use of the water flowing over it in its natural course, without diminution or obstruction: not, strictly speaking, a property in the water, but a simple use of it while it passes along—there being a perfect equality of rights among all the proprietors of that which is common to all, viz: a reasonable use, no proprietor having a right to use the water to the prejudice of another.

The allegation of damages in this case is set out certainly in general and somewhat vague terms; but still sufficient interference with his property, from which damage will be inferred, is set forth to justify the owner in asking to have his claim for compensation considered. He sets out a *prima facie* case of damage, viz.: a withdrawal from a stream flowing through his land, of a large quantity of water from its natural course. This may be a very trifling injury, if any, to the applicant's property, or it may be a very substantial injury, materially affecting its value, which may be in a great measure dependent on the water privilege in its natural state. But with the question of damage we have nothing to do. In the case of Reg. v. North Midland Railway Company, (2 Railway cases 1), where an owner applied for a mandamus to ascertain and compensate him for injury done to his works, by diverting a brook, under powers given by the Railway Acts, and which was opposed by the company on the ground that on the claimant's remonstrance they had restored the brook to its former level, and that no damage had been done by the alteration, the stoppage complained of having been frequently caused by floods before; it was held that it was a question for a jury to ascertain whether any damage had been done to the claimants; and that his alleging that he was injured by the diverting (i. e. altering the level) of the brook, was sufficient to induce the Court to grant a mandamus.

The fifth and sixth points may be considered together, and are

easily disposed of. We cannot understand how a mandamus could be awarded to assess the amount Mr. Botsford is entitled to receive on behalf of the other heirs of Mrs. Botsford without it clearly appearing who those heirs are, and how he is entitled to make, in his own name, this application on their behalf, and to receive their shares. This certainly cannot be ascertained from the only allegations we have, and which are contained in the 16th paragraph of the applicant's affidavit as follows: "That in and by a certain deed of "partition between the heirs of the said Sarah L. Botsford, dated "prior to the 24th day of February, aforesaid, and sometime during "the summer of 1865, all the other heirs remitted and acquitted "unto this deponent all right and title to the said lot of land, except "their right to damages occasioned by the obstruction on the said "Little River, which were expressly reserved, and when recovered "to be divided amongst the said heirs in proportion to their several "claims in the said estate of the said Sarah L. Botsford." From this it would seem that "the other heirs" remitted and acquitted to Mr. Botsford all right and title to said lot, except their right to the damages Mr. Botsford now claims, which he says were expressly reserved, and when recovered (he does not say by whom) to be divided, &c.

It is not necessary for us to determine how far such a claim could at law be transferred, because there is nothing here professing even to be a transfer of the claim to Mr. Botsford, but an express exception to the contrary, expressly reserving it, so far as they could, to themselves; nor need we inquire how far the other heirs, by parting with their interest in the land, have interfered with their right to claim damages at all.

On the whole, therefore, we are of opinion that a mandamus should issue to the Commissioners, commanding them to make the necessary application, to some one of the Justices of the Peace of the City and County of St. John, for a warrant to the sheriff, or any constable in the said City and County, to summon a jury, under the 18th Vict., c. 38, to assess the damages which A. E. Botsford has sustained in respect of his interest in the lands in question, by reason of any damage done by the Commissioners in the execution of the works contemplated by that Act; or to show cause to the contrary.

Rule accordingly. (a)

(a) ALLEN, J., being connected with the applicant, took no part in this case.

MOFFATT *v.* DUPLISSEY.

FEBRUARY 12th.

Defendant gave his note payable at a future day, to the plaintiff, for a debt due from A. to the plaintiff, A. agreeing, in consideration thereof, to convey land to the defendant. A. afterwards refused to convey the land. Held, that the giving time for the payment of A's debt was a good consideration for the defendant's promise, and that the plaintiff's knowledge at the time the note was given, of the agreement between the defendant and A., respecting the land, did not affect the plaintiff's right to recover on the note, he not being a party to such agreement.

Assumpsit on four promissory notes made by the defendant in favor of the plaintiff, tried before WELDON, J., at the last York Sittings, when a verdict was given for the plaintiff.

It appeared that the defendant and his brother were severally indebted to the plaintiff—the defendant's indebtedness being about $60, and the brother's about $420. They met at the plaintiff's house; he added the amounts of their indebtedness together, and the defendant assumed the payment of the whole, and gave the four notes in question, payable six months after date. The consideration on which the defendant assumed the payment of his brother's debt was, the agreement of the brother to convey to him his interest in a lot of land. This was spoken of by the brothers at the settlement made with the plaintiff, but he was no party to it. The defendant's brother afterwards refused to convey the land.

On a former day in this term, *Fraser* moved to set aside the verdict, contending that there was a partial failure of consideration, that the plaintiff knew the condition on which the defendant gave the notes, and he accepted them on the faith that it would be complied with. The condition not having been performed, the plaintiff could not recover. [ALLEN, J.: The plaintiff was no party to the agreement about the land.] There was no consideration for the defendant's promise to pay his brother's debt, Croft *v.* Beale, (5 L. & E. 408; 11 C. B. 172.) [RITCHIE, C. J.: The plaintiff gave time for payment of the debt.]

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court. A rule was moved for in this case on the ground of partial failure of consideration. The defendant's motive for giving the notes was an agreement made with his brother, by whom he was to be indemnified by a conveyance of lands; but the evidence does not show that the plaintiff was any party to this agreement. If the defendant's brother has deceived him, it is his misfortune; but the plaintiff should not be made to suffer for it. Giving time for the payment of the debt was a good consideration for the defendant's promise;

and as said by Jervis, C. J., in the case of Croft v. Beales, there is no reason why a party may not bind himself to pay the debt of another.

Rule refused.

LEARY v. ARMSTRONG.

FEBRUARY 13th.

The owner of land laid out and opened an alley-way leading from a street through his land, and leased the lots on each side of the alley. After the alley had been used by the public and the tenants occupying the lots, for more than twenty years, G., the administrator of one of the tenants, assigned to the defendant, and by the description of the land in the deed, conveyed to him the alley as a part of the property leased. Held, that this conveyance could not affect the right of the public to use the alley, and that the defendant was liable for obstructing it, though the plaintiff was the tenant of a house fronting on the alley, and also claimed under G. as representing another lessee of the property.

This was an action on the case for obstructing an alley-way in Woodstock.

At the trial before WILMOT, J., at the last Carleton circuit, it appeared that the plaintiff was tenant of a house in Woodstock. under a lease from John Hunter, Hugh M'Lean and James Grover, administrators of one Phillips. The land had been previously leased to Phillips for a term of twenty-one years by the executors and trustees of the late Jeremiah Connell, by lease dated 25th July, 1849. In several of the leases of property adjoining that of Phillips, made by the executors and trustees of Connell, the alley-way in question was expressly referred to, and in some of them shown by plans. The alley was a *cul de sac* running from the public street to the rear of plaintiff's house, and was shown to have been used as such by the tenants of the several houses in front of it, and by the public, for more than twenty-five years previous to the obstruction by the defendant for which the action was brought. In June, 1864, defendant shut up the alley-way by erecting upon it a wooden barn, or shed, which was the injury complained of by plaintiff.

For the defendant, a lease dated 25th Feb., 1863, made between James H. Doyle, administrator of one John Doyle and the said James Grover, and one John McCoy, administrators of one Alice Kerrigan and John Reardon, to one Isaiah McCoy, was put in. By this lease the lessors demised to Isaiah McCoy, for a period of twenty one years, a certain lot of land lying to the northward of the alley and fronting on Wellington street, the description of which apparently

included the alley-way. This lease was, on the 20th May, 1864, assigned by McCoy to defendant. The title of Alice Kerrigan was by lease from the Connell estate, but the original lease to her was not put in evidence. The defendant contended that under the Kerrigan lease so assigned to him, he had a right to do as he did, and that, as James Grover was one of the parties conveying to McCoy through whom the defendant claimed, the plaintiff, who also claimed under James Grover, was estopped from denying his right. The learned Judge reserved this point, and upon the other questions raised in the case the Jury found for the plaintiff.

G. Botsford in Michaelmas Term last obtained a rule *nisi* for a new trial on the above ground.

S. R. Thomson, Q. C., now showed cause. The plaintiff proved a right of way existing for more than twenty-five years, and that during that time it was used for going into that particular tenement. It is immaterial whether it is a public way or a private way.

G. Botsford, contra. The case rests on the position Grover has put himself into with reference to defendant. [RITCHIE, C. J.: No, the user of more than twenty years settles it.] Grover leased this specific right to defendant; he would be estopped from disputing the defendant's right, and the plaintiff, claiming under Grover, can have no better title. [RITCHIE, C. J.: If there was a dedication of it to the public, Grover could not take it away.] As against the public he might not;—but it would be different between these parties. [WILMOT, J.: The lease was not given until the way had been open twenty-five years.] Grover having given the defendant a lease of the land in question, he has the right as against any one subsequently claiming under Grover, and if the plaintiff has suffered injury, his remedy must be against Grover. [RITCHIE, C. J.: This is claimed as a public way; and if so, nothing Grover could do can affect it.] The special user of it as an entrance to the tenement does not make it a public way.

RITCHIE, C. J. There is no doubt about this case. Grover rents to the plaintiff two rooms in a house, by a verbal lease, saying nothing about the right of way, the plaintiff only receiving from Grover the right of occupation, He finds that the original proprietor of the freehold laid out the alley which leads to his tenement, as a public way twenty-five years ago, by opening it and showing it on a plan. Plaintiff, as one of the public, says, "I wish to use this alley-way." I think he had a perfect right to do so, and should be protected in the exercise of his rights. He stands in a very different position from Grover.

WILMOT, J. I am of the same opinion. The way was opened twenty-eight years ago by the original owner of the property; and in leases of the adjoining lots the alley is referred to and shewn by plans, as a public way. Grover had, therefore, no right to give a lease of the way, and the defendant no right to obstruct it. The lease to the defendant cannot affect the right of the public to use the way.

WELDON, J. I am of the same opinion.

Rule discharged. (*a*)

(*a*) ALLEN, J., having been counsel in the cause, took no part in the case.

McDONALD *v.* WATT.

FEBRUARY 16th.

Where Justices make an order for support under the Insolvent Debtors Act—1 Rev. Stat., c. 124,)—and it appears by the examination of the debtor that he has given an undue preference to one of his creditors—this Court has power to quash the order.

H. B. Rainsford showed cause against a rule *nisi* obtained to quash an order made for the support of the defendant under the Insolvent Debtors Act, on the ground that he had given an undue preference by conveying land to his son after the commencement of this action. He contended that as the Justices had decided that there was no undue preference, the Court could not interfere, because the Justices were the proper tribunal to decide the facts—1 Rev. Stat., c. 124. [ALLEN, J.: If there was conflicting evidence on the point you may be right; but here the defendant admitted the undue preference.] The Act gives no appeal from the decision of the Justices. [RITCHIE, C. J.: This Court has a supervising and controlling power over all inferior tribunals, statutory or otherwise.]

Curry, contra, cited Wyer *v.* Goss (1 Kerr, 193).

Per Curiam. The conveyance of the land by the defendant to his son after the commencement of the action, was an undue preference, even admitting that the son was a *bona fide* creditor, and therefore the Justice had no authority to make the order for support. If a debtor makes an undue preference of one of his creditors, he does it at the risk of imprisonment and must take the consequences of his own act. The rule must be made absolute to quash the order of the Justices.

Rule absolute.

VANBUSKIRK *v.* GREEN.

FEBRUARY 19th.

The defendant for value received promised to deliver the plaintiff thirty chaldrons of coal on demand. The only demand on the defendant and the only refusal by him to deliver the coal, was a refusal to allow the plaintiff to put the coal on board a certain vessel of which defendant claimed to be the owner, though he offered to deliver the coal to the plaintiff who refused to receive it, unless he was allowed to put it on board the vessel.

Held, that as there was no contract about the vessel, the defendant's refusal was no breach of the agreement to deliver the coal.

Quære whether such an agreement is within 1 Rev. Stat., c. 116.

This was an action of assumpsit brought on the following agreement signed by the defendant, "For value received, I promise to "deliver Wallace Vanbuskirk thirty chaldrons of good coal on "demand, fourteen barrels and one bushel to be considered a chaldron."

The declaration contained three special counts and the common counts to which the defendants pleaded non-assumpsit. At the trial before ALLEN, J., at the last Queen's Circuit, the defendant's counsel moved for a nonsuit on the grounds:

1. That the declaration did not show any consideration for the defendant's promise.

2. That the agreement was not a note in writing payable in specific articles, as contemplated by 1 Rev. Stat., c. 116.

3. That no demand and refusal to deliver the coal had been proved.

Leave was reserved to the defendant to move to enter a nonsuit, and the case went to the jury who found a verdict for the plaintiff. A rule *nisi* having been granted to enter a nonsuit.

A. L. Palmer showed cause in Michaelmas Term last, and *Jack*, Q. C., was heard in support of the rule. The argument was principally upon the meaning of the Act, (1 Rev. Stat., c. 116,) but it is omitted in consequence of the judgment of the Court being on another ground.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

The declaration in this case contained three special counts. The first count stated that the defendant, on the 23rd Feb., 1864, by his certain writing or agreement, signed by him bearing date, &c., agreed with the plaintiff for value received, and promised to deliver to the

said plaintiff thirty chaldrons of good coal on demand, fourteen barrels and one bushel of coal to be considered a chaldron, and then and there delivered the said writing or agreement to the plaintiff, whereby, and by means whereof, the said defendant then and there became liable to deliver to the said plaintiff the said thirty chaldrons of coal, in the said writing and agreement specified, and being so liable, the said defendant in consideration thereof, afterwards to-wit on the day and year aforesaid, at, &c., undertook and faithfully promised the plaintiff to deliver him the said thirty chaldrons of coal on demand.

2nd Count. That whereas heretofore to-wit on, &c., at, &c., the plaintiff, at the special instance and request of the defendant, purchased from the defendant thirty chaldrons of good coal and paid the defendant for the same, and the defendant, by his certain agreement in writing, bearing date the day and year aforesaid for such payment and value by said defendant received, promised to deliver to the said plaintiff thirty chaldrons of good coal on demand, and also, in said agreement in writing, agreed that fourteen barrels and one bushel of coal should be considered a chaldron, and then and there delivered the said agreement to the plaintiff, whereby said defendant became liable to deliver to the plaintiff thirty chaldrons of coal, according to the terms of the said agreement, and promised so to do, yet the said defendant, although often requested, has not delivered the said thirty chaldrons of coal, or any part thereof, to the plaintiff.

3rd Count. That whereas the defendant, heretofore to-wit on, &c., at, &c., made his certain promissory note in writing, bearing date the day and year aforesaid, and thereby then and there, for value received, promised to deliver to the plaintiff thirty chaldrons of good coal on demand, fourteen barrels and one bushel to be considered a chaldron, and then and there delivered the said promissory note to the plaintiff, by means whereof and by force of the Statute, &c., the defendant then and there became liable to deliver to the plaintiff the said thirty chaldrons of coal, in the said promissory note specified, when he, the said defendant, should be thereunto afterwards requested, and being so liable, the said defendant, in consideration thereof, afterwards to-wit, &c., undertook and promised the plaintiff to deliver to him the said thirty chaldrons of coal, in the said promissory note specified, when he, the said defendant, should be thereunto afterwards requested.

The Common Counts then followed, and a breach alleging that the defendant, not regarding his said several promises and undertakings, has not as yet delivered the said thirty chaldrons of coal, or any part of the same, or paid the several sums of money, or any part of the same, to the plaintiff, (though often requested so to do);

but to deliver or pay the same has wholly neglected and refused, &c.

The defendant pleaded the general issue.

It appeared at the trial that the plaintiff had sold a horse and sleigh to the defendant, who agreed to pay for them in coal, and gave the plaintiff the following writing:

NEWCASTLE, 28th February, 1864.

"For value received, I promise to deliver Wallace Vanbuskirk thirty chaldrons of "good coal on demand, fourteen barrels and one bushel to be considered a chaldron."

"SAMUEL GREEN."

There was no evidence of any demand upon the defendant or any refusal by him to deliver the coal, (an essential ingredient to the maintenance of the action), with the exception of his refusal to allow the plaintiff to load it on board a woodboat, which the defendant then claimed the right to; but he expressly offered at the time to measure out the coal to the plaintiff, who refused to take it, unless he was also allowed to put it on board the boat. This he had no right to require by the contract. There was, therefore, no breach by the defendant, and the plaintiff should have been nonsuited. In this view of the case it is not necessary to consider the effect of that Section of the Rev. Stat. (1 Rev. Stat., c. 116) under which the action is brought, the meaning of which is by no means clear.

Rule absolute for nonsuit.

RIDEOUT v. STEVENS.

FEBRUARY 19th.

The Rev. Stat., c. 137, § 43, depriving a plaintiff of costs where he does not recover more than £5, only applies to cases in which Justices of the Peace have jurisdiction; therefore, in an action for non-performance of a contract to deliver goods, the plaintiff is entitled to costs without a Judge's order, though he recovers less than that amount.

This was a summary action of assumpsit for non-performance of a contract to deliver goods, tried before WELDON, J., at the last York Sittings, in which the jury found a verdict for the plaintiff for $7.25.

The Clerk taxed summary costs on the suit.

J. L. Marsh, on the first day in this term, applied to review the taxation of costs, contending that under 1 Rev. Stat., p. 369, § 43, the Clerk had no right to tax costs without a Judge's order.

C. H. B. Fisher, contra, contended that the 43rd Sect. of the Act only referred to actions that might have been brought before a Justice of the Peace, and that a Judge's certificate was not necessary.

Cur. adv. vult.

WILMOT, J., now delivered the judgment of the Court.

This was a summary action on a special agreement, in which a verdict was given for plaintiff for $7.25, and full costs were taxed by the clerk. Application was made for a review of the taxation on the ground that the clerk had no authority to tax costs without a Judge's order, and 1 Rev. Stat., c. 137, § 43, was cited in support of the application. The Section is as follows: "If any action be "brought in any other than the Justice's Court, and the plaintiff do "not recover more than five pounds, he shall not have costs, unless "the Judge who tried the cause, or the Court, order that he shall, "upon the ground of the demand having been reduced by set off, "or other reasonable cause." The former Justice's Act, 4 Wm. 4, c. 45, § 77, enacted "that in any action or suit brought in any other "Court than the said Justice's Court for any debt, if the plaintiff "do not recover more than five pounds, he shall not be entitled to "any costs whatever unless he obtain an order of the Court, or of "the Judge before whom the cause was tried, for entering up judg-"ment for costs, upon the ground of the demand having been "reduced by set off, or upon reasonable cause shewn to such Court "or Judge for bringing the action in such other Court."

The words "for any debt" in this Act have been left out of the Rev. Stat.; but we think the Section relied on should be read and construed with the whole Act, and that it would thus read: "If any action authorized to be brought by and under this Act, be brought in any other than the Justice's Court," &c. Now, as the plaintiff could not have brought his action on the special agreement in a Magistrate's Court, he was entitled to bring his action in this Court; the Clerk, therefore, was justified in taxing the costs, and the motion must be dismissed.

Rule accordingly.

RANKINE *v.* LETSON.

FEBRUARY 19th.

The venue in a cause was laid in Northumberland, but the presiding Judge at the Circuit being connected with the plaintiff, declined to try it. The plaintiff then applied to change the venue to Kent, and obtained an order to do so, with leave reserved to the defendant to apply to bring it back to Northumberland. Defendant then obtained an order on the common affidavit to restore the venue to Northumberland. Held, that as this was the first opportunity defendant had of applying to change the venue, the order was properly made.

This cause was entered for trial at the last Northumberland Circuit, but the Chief Justice declined to try it in consequence of his being connected with one of the plaintiffs. The plaintiffs subsequently applied to Mr. Justice ALLEN, on affidavit of these facts, to change the venue from Northumberland to Kent; and His Honor, after hearing the attorneys, made an order "that the plaintiffs be at "liberty to amend their declaration in this cause by changing the "venue from the County of Northumberland to the County of Kent, "the defendant having leave to apply, if he thinks proper, to bring "back the venue to Northumberland."

Subsequently to this, the defendant applied on the common affidavit to change the venue, when His Honor made the common order for bringing the venue back to Northumberland.

Fraser, on a former day, moved to rescind the last-mentioned order on the ground that after the venue was changed to Kent, as there was no leave given to plead *de novo*, the cause was at issue; and there was nothing to take the application out of the ordinary rule, that, after issue joined, an application to change the venue could only be made on special grounds.

Stratton, contra, contended that the plaintiff, having taken the first order with the right reserved to the defendant, had no cause to complain.

Cur. adv. vult.

WILMOT, J., now delivered the judgment of the Court.

This was a motion to set aside a common order for changing the venue from Kent to Northumberland. The venue was originally laid in the last-mentioned County, where the cause was entered for trial, but the Chief Justice refused to try it in consequence of his being a connexion of one of the plaintiffs. On a special application before Mr. Justice ALLEN, made by the plaintiffs, the declaration was amended by changing the venue to Kent, with leave to the defendant to apply to have it brought back to Northumberland. The defendant applied to have the change made, and on the common affidavit the common order for change was given. We think the order must stand. The plaintiffs took out the order with full notice that the venue might be brought back to Northumberland, and they cannot be damnified thereby, for the venue now stands precisely where they first laid it, and it is the first opportunity the defendant has had to have the venue changed.

Motion dismissed. (*a*)

(*a*) RITCHIE, C. J., took no part in the case.

Ex Parte TRAVIS.

FEBRUARY 19th.

To entitle a Student at Law to the benefit of the reduction of the term of study allowed to graduates by the Act 26 Vict., c. 23, he must be a graduate at the time of commencing his study.

This was an application for a rule calling on the Barristers' Society to show cause, why a mandamus should not issue to compel them to examine Mr. Jeremiah Travis, a Student at Law, with a view to his being admitted an attorney. It appeared that Mr. Travis entered the office of C. Duff, Esq., a barrister of this Court, in February, 1864, he not being at that time a graduate of any University. He continued in the office until April, 1865, when, with the permission of Mr. Duff, he entered Harvard University and attended the law classes there until July, 1866, where he graduated and received the degree of L. L. B. He then returned to Mr. Duff's office and continued his studies until the present term.

A. L. Palmer, Q. C., for the motion. This application is made under the Act 26 Vict., c. 23, which enacts "that the term of study for a Student at Law be four years; and where the student is a graduate of any legally authorized University, or College, the term be reduced to three years." The Act follows the words of the Rule of Court of Hilary Term, 4 Geo. 4, (Allen's Rules, p. 11,) under which graduates who did not become such until after they entered as students, were admitted. [RITCHIE, C. J.: That was in cases where they had actually finished their studies at the College before entering upon the study of the law, but had certain nominal terms to keep before they were entitled to a degree.] In England, students were allowed to keep their term at the University and the Inns of Court concurrently. Lord Erskine took a degree after he commenced to study law. The fair construction of the Statute is, that if the student is a graduate when he comes to be admitted, he is entitled to the benefit which the Act gives to graduates.

D. S. Kerr, Q. C., contra. This Act must be construed by the same rules as other Acts. The Common Law maxim—"*Cessante ratione legis, cessat ipsa lex*"—applies here. The reason of the Act was to encourage students to pursue a liberal course of education at College, before entering as students, and so to render them more fit to pursue their studies to advantage. That which is clearly implied by Statute is not made stronger by being expressed. The case of Lord Erskine has no bearing on the present one, for the English regulations in reference to students are entirely different from our own.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

We have heard nothing to lead us to think that the construction we placed on the Act—26 Vict., c. 23—in the case of Mr. Jack, is incorrect. We adhere to the opinion then expressed, that no student can claim to have his time of study reduced, unless during the whole time of his study he was a graduate of some legally authorized University or College. This Mr. Travis does not claim to have been, and therefore his application for admission is premature.

Mandamus refused. (*a*)

(*a*) By the Act—6 and 7 Vict., c. 73, § 5—which makes a person who has taken the degree of Bachelor of Arts or of Bachelor of Laws in one of the Universities, after a service under articles for three years, capable of being admitted as an attorney, he must have taken such degree before the date of his articles. *Ex parte* Bradford, 5 Jur., N. S., 643.

THE QUEEN *v.* SIMPSON.

FEBRUARY 19th.

An order of affiliation may be quashed in part and confirmed as to the rest, if the defective part can be separated from the other.

The General Sessions of Queen's County had made an order of affiliation adjudging the defendant to be the putative father of a bastard child, of which one Martha Appleby had been delivered; and ordered him to pay £5 for the lying-in expenses of the mother, and the further sum of £5 2s. 6d. for the expenses of his apprehension and conviction, and the sum of 3s. 6d. per week for the future support of the child.

The mother was a resident in Queen's County, but for a short time before, and at the birth of the child, she was living in the County of York. She returned to Queen's County a few days after the birth of the Child, and made application for support to the overseers of the Poor of Gagetown, at whose instance the proceedings were taken against the defendant; but they had not paid or become liable for any part of the lying-in expenses.

The order of Sessions having been brought up by certiorari, and a rule *nisi* obtained to quash it on that ground.

Needham showed cause on a former day in this term, and contended that the order was good as to the expenses of apprehending and the future support; as the child became chargeable to any Parish where application was made for its support. That an order was not like a conviction, but might be good in part.

H. B. Rainsford, contra, contended that the child was chargeable where it was born. At all events, it was not chargeable to the Parish of Gagetown till the overseers of that Parish had paid something for its support. If the order was bad in part, it could not stand. [ALLEN, J.: There is a distinction between orders and convictions. What is the objection to that part of the order which requires the defendant to pay the expenses of his apprehension, and for the future support of the child?]

Cur adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

The only question in this case is whether an order of affiliation made under the revised Statutes, cap. 57, can be sustained in part. It is clear that the Sessions had no right to require the defendant to pay for the lying-in expenses, which were not a charge upon the overseers of Gagetown; but with regard to the other sums, there can be no objection, the Sessions having adjudged the defendant to be the father of the child.

If an order be defective in one part, it may be quashed as to that and confirmed as to the rest, if the different parts may be separated, as they can in this case. Rex. *v.* Sweet (9 East 25,) Rex. *v.* Maulder (8 B. & C. 78,) Rex. *v.* St. Nicholas (3 A. & E. 79).

This order must therefore be quashed as to the £5 for the lying-in expenses, and affirmed as to the remainder.

Rule accordingly.

THE QUEEN *v.* HAMMOND, and another.

FEBRUARY 19th.

One of the conditions of a Bond given to the Crown by a Deputy Postmaster, required him to give three months notice to the Postmaster General of his intention to resign his office, and to pay all sums of money chargeable against him as Postmaster. At the time of his resignation, a Postmaster was a defaulter, and died insolvent, about twenty-one months after. No proceedings were taken against him to enforce payment, though he was applied to several times, and promised payment, and no notice of his indebtedness was given to his sureties till after his death. Held, that his sureties were not entitled to be relieved from the Bond under the 33 Hen. 8, c. 39, § 79.

In Easter Term, 1865, *G. Botsford* obtained a rule *nisi* for the Attorney General to show cause why certain proceedings taken against the defendants, as sureties on a bond executed by them with

the Deputy Postmaster at Grand falls, should not be stayed, and the defendants relieved under the Act 33 Hen. 8, c. 39, § 79. The grounds of the application were set forth in an affidavit made by them, which stated that on the 29th May, 1857; they became bound in a bond to the Queen as sureties for D. B. Raymond as Deputy Postmaster at Grand Falls. That on the 31st January, 1861, Raymond resigned the said office, and died insolvent on the 22nd November, 1862. That on the 27th March, 1863, the sureties were notified by the Post Office Department that Raymond was indebted to it in the sum of $69.90 for the quarter ending 31st January, 1861, and requiring them to pay the same, this being the first intimation they had of Raymond's indebtedness. In May, 1863, they received a further notification from the department to the same effect. On applying to the Postmaster General to know why they had not been notified of the indebtedness of Raymond in his lifetime, they were told by him that Raymond had promised from time to time to pay the balance, and he always expected he would have done so: that after Raymond resigned the office, he was elected a member of the House of Assembly, and they verily believed that if they had been notified of his indebtedness during his lifetime, they could have compelled him to pay the amount, or secured themselves, as he had, at the time of his resignation, sufficient property. Proceedings by *scire facias* were afterwards taken against them on the bond, to which they pleaded, and their plea being demurred to, judgment was given against them on the demurrer. One of the provisions of the bond required Raymond, in case of his resigning the office of Deputy Postmaster, to give three month's notice to the department of his intention to resign, and at the time of his resignation, to pay "to the Postmaster General, his successor or successors, or the principal superintending officer of the Post Office Department of the "Province for the time being, all such sum, or sums of money, as "may have been chargeable against the said D. B. Raymond by "reason of his said office."

Watters, Q. C., shewed cause in Michaelmas Term last.

G. Botsford, in reply cited Reg. *v.* Appleby (Berton's Rep., 397), West on Extents (201), Sir Thomas Cecil's case (7 Rep., 19), Trollop's Lane, (51), contending that as the application was to the equitable jurisdiction of the Court, under the terms of the Act 33 Hen. 8, the parties were entitled to relief on account of the neglect of the Postmaster General to enforce payment of the deficiency in Raymond's lifetime. The intention of the provision in the bond, requiring payment of all balances due the department on resignation of the office, was expressly to relieve the sureties, if the Postmaster General

accepted the resignation, without enforcing payment of the balances due by Raymond. The Postmaster General had a right at any time to dismiss his subordinate for misconduct and hold his surety liable for any deficiency; but if he accepted the resignation of a defaulter, and took no proceedings against him, he misled the sureties; and in this case the delay had prevented the sureties from securing themselves. This clause was inserted in the bond for the benefit of the surety and not of the Crown.

Cur. adv. vult.

WILMOT, J., now delivered the judgment of the Court.

This was an application for relief from a bond executed by the defendants as sureties for one D. B. Raymond as Deputy Postmaster at Grand Falls. We have carefully examined the affidavits upon which the application is made, and we have failed to see any such equities disclosed as will justify us in relieving the defendants from their liability. The neglect of the Postmaster General in enforcing the claim against Raymond for the balance in his hands,—which is really the only equity relied on by the defendants—is not of itself sufficient to entitle them to the relief sought for. Raymond resigned the office on the 31st January, 1861, and died insolvent in November, 1862; and during that time promised the Postmaster General to pay, and the Postmaster General was expecting the amount to be so paid by him, and for this reason only did not press the sureties.

In Heath v. Key (1 Y. & Jer. 434) it was resolved that "a Court of Equity will not relieve a surety by bond, upon the ground of the creditor having given time to the principal debtor, unless there has been an express and positive contract between them for that purpose." No such contract appears, or can be presumed in this case.

In Madden v. McMullin (13 Ir. Com. L. Rep. 305) it was held that mere negligence, even if gross, on the part of the creditor, unaccompanied by positive acts of concurrence in the defalcation of a debtor, will not discharge the surety and is no ground of equitable defence.

In Bell v. Banks (3 Scott. N. R. 497, S. C. 5 Jur. 486) it is decided that giving time to the principal means, giving such time without the knowledge and consent of the surety, as prevents the creditor from resorting to the principal on the day appointed, and thus puts the surety, who expects that this resort will be made in the first instance, in a worse situation than he was before. But an arrangement between the creditor and principal, of such a nature as may induce the creditor to give time, but does not by its terms lead him to do so, is not such giving time as renders the sureties' situation worse than it was before. A mere voluntary abstaining to proceed

to judgment is not giving time. With these cases, as applied to the facts disclosed by the defendants' affidavits, we are of opinion they are not entitled to relief, and the rule will be discharged.

Rule discharged. (a)

(a.) ALLEN, J., having been counsel in this cause, took no part in the judgment.

THE QUEEN v. CREGAN.

FEBRUARY 19th.

On an indictment for murder, the jury found the prisoner guilty of an assault only, and that such assault did not conduce to the death of the deceased. Held, that the prisoner, under such finding, could not be convicted of the assault under the Rev. Stat., c. 149, § 20.

The prisoner was tried before ALLEN, J., at the St. John Circuit in August last, on an indictment charging, that on the 25th May last, he feloniously did make an assault upon William Francis Humbert, and him the said W. F. H., then and there, feloniously, &c., did kill and murder.

It was proved that Humbert, the prisoner, and several other persons, were standing in the street in St. John, on the night of the 25th May—the prisoner and deceased facing each other and about four feet apart—talking, but not appearing to be quarrelling. The prisoner struck the deceased who fell immediately into the gutter with his head outside the curb stone. He did not fall backwards at full length, but seemed to settle down on his haunches and then fall over. It did not appear that the prisoner had anything in his hand when he struck the blow, which the witnesses thought was given with the fist. It was found that the deceased's skull was fractured near the occipital bone, the fracture extending down to the base of the skull. The surgeons who examined the wound stated that such an injury could not be received from a fall caused from a blow from the fist; that it might be caused by a blow given with a heavy blunt instrument by a person standing behind the deceased, but not by a person standing in front, or by the side of deceased, and that a blow given by an iron bolt, produced at the trial, might cause such a wound.

The iron bolt (about a foot long) was found by a policeman on the 31st May, in the sewer or drain at the corner of the street, about five feet from where the deceased fell, and about three feet below the surface of the ground. The iron bars of the drain were

far enough apart to allow the bolt to pass through. The prisoner's counsel objected to the evidence respecting the bolt, because it had not been found at the time of the assault, and it was received subject to his objection.

The learned judge directed the jury that if the blow was given in consequence of insulting language used by the deceased to the prisoner, and death ensued from the blow, it would reduce the killing from murder to manslaughter, because a blow given with the fist would not be likely to produce serious injury, and would not indicate any malicious intention; but if the blow was given with the iron bolt, or a stone, or any weapon which would probably produce serious injury, the killing would be murder. That if the prisoner struck deceased with his fist, but the death was not caused directly or indirectly by that blow, the prisoner might be found guilty of an assault under the Statute (1 Rev. Stat., c. 149.)

The jury found the prisoner guilty of an assault only, and that such assault did not conduce to the death of the deceased. The question was reserved under the Rev. Stat., c. 159, whether the prisoner could be convicted of a common assault on this indictment.

In Michaelmas Term last *S. R. Thomson*, Q. C., moved to arrest the judgment, and contended that the prisoner could not be convicted of an assault on this indictment; that the assault contemplated by the 1 Rev. Stat., c. 149, § 20, must be part of the act for which the prisoner was prosecuted, and conduce to the death of the deceased, and not an independent and distinct assault. If the prisoner was indicted again for this assault he could not plead *autrefois convict.* Reg. *v.* Phelps (1 C. & Mar. 180), Reg. *v.* Bird (2 Eng. L. & Eq. 448; 15 Jur. 193), Reg. *v.* Guttridge (9 C. & P. 471), Reg. *v.* St. George (9 C. and P. 483). The evidence of finding the bolt was improperly admitted.

Watters, Q. C. contra, contended that if the blow given by the prisoner was part of the transaction which conduced to the death, the conviction was right under the Rev. Stat., c. 149, § 20, which was substantially the same as the English Statute 1 Vict., c. 85, § 11: "Whoever, on a trial for murder or manslaughter, or any other "felony which shall include an assault, shall be convicted of an "assault only, shall be imprisoned," &c. The evidence respecting the bolt was properly admitted; though its effect was weakened by the length of time that had elapsed.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

The jury found the prisoner guilty of a common assault, and at the same time found that such assault did not conduce to the death of the deceased. Under these circumstances, we think the conviction cannot be sustained on this indictment.

Judgment arrested.

OUTHOUSE v. HICKMAN and others.

(Equity Appeal.)

Semble.—That the Court of Equity has power to supervise the proceedings of Trustees of absconding debtors appointed under the 1 Rev. Stat., c. 125, and to open and examine accounts adjusted by them; but it will not interfere where there is no fraud, and the proceedings of the Trustees have been regular, and no special ground is stated.

This was a special case stated to determine the right of the plaintiff to an injunction granted by WILMOT J., to restrain the defendants who were Trustees of an absent debtor, under 1 Rev. Stat., c. 125, from selling the property of the debtor. The facts were stated in the special case as follow:—

Proceedings were taken against the plaintiff as an absent debtor, under the Rev. Stat., cap. 125, and notice of the warrant to attach the debtor's property was published on the 1st July, 1863. The defendants were appointed trustees on the 9th November, 1863; they were duly sworn, and their appointment published in the *Royal Gazette* on the 18th Novembor, and registered in the County of Westmorland on the 11th December, 1863.

The plaintiff, who was a mariner, first heard of the proceedings in the Mediterranean in October, and returned to this Province 13th December, 1863, as soon as he could get here. After his return, in December, 1863, he gave the trustees notice *inter alia*, that he disputed the account of the creditor, Timothy Outhouse, at whose intance the proceedings were taken, and that Timothy Outhouse had no claim against the plaintiff, and requested the trustees before allowing the account or taking other proceedings, to call a meeting and have the matter thoroughly investigated—concluding in these words—"If there are any other claims in your hands which are just "and right and for which I may be liable, I am willing and prepared "to pay without having my property sold, or further proceedings."

On the 29th and 30th January, 1864, the trustees investigated the claim, when counsel attended and witnesses were sworn and examined. On the 20th February the trustees gave notice to the parties that they had decided that £92 3s. 2d. was due Timothy Outhouse. After this notice the plaintiff requested the trustees and Timothy Outhouse to refer the claim to arbitration, which they declined to do. The plaintiff then appealed to the late Chief Justice Parker, who on summons and cause shown, decided that he had no authority to interfere. In Trinity term, 1864, the plaintiff applied to the Supreme Court for a *certiorari* to bring up the proceedings had before the trustees on such investigation, which was refused on the ground that the Court had no jurisdiction.

Other claims against the plaintiff, besides that of Timotuy Outhouse, were filed with the trustees. The trustees advertised the plaintiff's land for sale on 11th July, 1864. On the 6th July, 1864, a bill was filed, and an injunction granted *ex parte* by Mr. Justice WILMOT to restrain the trustees from selling the land. It is admitted that the trustees had not been guilty of fraud in the allowance of Timothy Outhouse's claim.

The questions for the opinion of the Court were—

1. Whether the Court had jurisdiction to review or investigate the allowance by the trustees of the claim against the plaintiff under the facts of this case.

2. Whether a Judge had jurisdiction or right to grant an injunction, under the above state of facts.

The case was argued in Michaelmas Term last by *A. J. Smith*, Q. C., for the trustees. He contended that the Court had no right to interfere unless fraud was shown. By the 14th Sect. of the Act, the property passed to the trustees on their appointment, and the debtor had no right to it unless there was a surplus after payment of his debts. A Court of Equity could not override the law. The plaintiff having agreed to abide by the decision of the trustees, was bound by it, and was estopped from applying to the Court.

Hanington contra contended that the Act did not make the decision of the trustees final. All trustees were amenable to the Court of Equity; a decision of the Commissioners appointed under the Act 59 George III, c. 31, for liquidating the claims on the French Goverment, was held to be examinable in a Court of Equity, even after an appeal to the Privy Council. Hill *v.* Reardon. (1 Jacob 84; id. 2 Russ. 608).

Courts of Equity had exclusive jurisdiction over all trusts (1 Atk. 491), Earl of Oxford's case, (3 White & Tudor's, L. C. 154), Barton v. Tattersall, (1 Russ & My, 237). The jurisdiction of Courts of Equity could only be taken away by express words; and where doubt hung over a question it was a sufficient ground for continuing an injunction until the doubt was removed, Maxwell v. Ward (11 Price 17). The plaintiff was not estopped by the award, for Courts of Equity would investigate the mistakes of arbitrators. Nichols v. Chalie, (14 Ves. 271). Sheriff v. Coates, (1 Russ & My. 159). Cupit v. Jackson), 13 Price, 721—S. C. 1—M'Clel. 495).

Cur. adv. vult.

RITCHIE, C. J. now delivered the judgment of the Court, (after stating the facts set forth in the special case).

This special case does not impugn the legality or regularity of the proceedings. In fact, the Statute in express terms makes the registry of the appointment of trustees conclusive evidence in all Courts of the regularity of the proceedings.

The trustees are not trustees of the creditors only, but are trustees of the debtors as well; and as such, the property and rights of the debtor are vested in them, and they are by express terms authorized to adjust the accounts, &c., not only of the creditors of the estate, but of the debtors to the estate. This, as well for the interest of the estate in protecting all its funds, as for the absent debtor in protecting his interest from improper claims. The investigation of the creditor's claim in this case took place at the instance of the debtor himself, who, with the creditor, was present by his counsel. Witnesses were examined under oath and the trustees adjusted the account at £92 3s. 2d. The special case sets forth no objections on behalf of the debtor as to the mode in which the investigation was conducted; alleges no mistake, improper conduct or error of any kind, either in the proceedings or the conclusion at which the trustees arrived; nor any dispute between any of the parties; nor does it even set forth any reasons why the matters should have been referred to arbitration, but the contrary; as the presumption certainly is that the account was fairly and properly adjusted; and expressly relieves the trustees from any imputation of fraud. We by no means wish to be understood as deciding that in no possible case that may arise, will this Court in the exercise of its equitable jurisdiction refuse to supervise the conduct of trustees under this Act, or interfere with, or open an account adjusted by them. But we do say that when, as in this case, the trustees have acted strictly in pursuance of the Statute, and no special ground is set forth, we

should not be warranted in interfering with their proceedings by tying up their hands, and preventing them from closing up the estate and obtaining their discharge in accordance with the terms of the Act. The injunction must therefore be dissolved.

Order accordingly.

GENERAL RULE.

(New Trials.)

ORDERED, That in future the notices of motions for new trials, or to set aside verdicts, required to be given by the rules of Michaelmas Term, 5 Wm. 4, and Michaelmas Term, 1 Victoria, shall state particularly the grounds of the intended motion.

For example:—If the motion is to be made on the grounds of misdirection, or improper admission, or rejection of evidence. the notice shall set forth the particular part or parts of the Judge's direction objected to, and the particular portion or portions of evidence alleged to have been improperly admitted or rejected; and in like manner on all other grounds, specifying the same separately and distinctly, and as particularly as the circumstances of the case will admit of, and the party shall, on the motion, be confined to the grounds so specified.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NEW BRUNSWICK,

IN EASTER TERM,

IN THE THIRTIETH YEAR OF THE REIGN OF QUEEN VICTORIA.

SHEPHERD *v.* HALLET.

APRIL 9th.

A cause can only be made a *remanet* by order of the Judge at *Nisi Prius.*

Where the plaintiff countermanded notice of trial twice; first, because the presiding Judge was incapable, by interest, from trying the cause; and secondly, in consequence of the absence of his counsel from the country, the Court discharged a rule for judgment, as in case of a nonsuit, on his giving a peremptory undertaking.

Needham moved for judgment as in case of a nonsuit, the plaintiff not having proceeded to trial according to the practice of the Court.

G. Botsford opposed the motion on an affidavit of the plaintiff, stating that the notice of trial which had been given for the York Sittings after Trinity term, 1865, was countermanded, because he ascertained that the Judge, who was to preside, could not try the cause; that at the time of the next sittings, when he intended to try the cause, his counsel was absent from the Province, and he was therefore obliged again to countermand the notice of trial; but that he fully intended to proceed to trial. He contended that a counter-

mand of the notice of trial under the circumstances was equivalent to the cause being made a *remanet*, and therefore that the plaintiff ought not to pay costs.

Needham contra.

Per Curiam. In order to make a cause a *remanet*, the record should be filed and the cause be ordered by the Judge to stand as a *remanet*. You have shewn sufficient ground for refusing the rule on giving a peremptory undertaking on the usual terms of payment of costs.

Rule accordingly.

PRESTON *v.* SIMONDS.

APRIL 12th.

The declaration in an action for excessive distress, alleged that the plaintiff held land as tenant to defendant at a certain rent; that the defendant wrongfully seized goods on the premises as a distress for arrears of rent alleged to be due, viz:—$311, and sold the same for the said alleged arrears, whereas a small part only of the said alleged rent, viz:—$70, was in arrear. There was no allegation that more goods were taken or sold than were necessary to produce the rent actually due. Held—that the declaration disclosed no cause of action; that some rent being due, the distress itself was not a wrong, and that the mere distraining and selling on a claim of more than was due, was not actionable.

This was an action on the case for excessive distress. The declaration contained four counts. The first count stated that whereas the plaintiff before and at the time of the grievances hereinafter next mentioned, held and occupied certain premises with the appurtenances as tenant thereof to the defendant, at or under a certain rent therefor payable by the plaintiff for the same; to-wit, &c. Yet the defendaut contriving and maliciously intending wrongfully and injuriously to injure the plaintiff—in this behalf, heretofore to-wit, &c., falsely and maliciously pretending that a large sum of money, to-wit the sum of $311.50, was then due and in arrear from the plaintiff to the defendant for rent of the said premises, wrongfully and unjustly seized and took certain goods and chattels, to-wit, &c. (specifying the articles) of the plaintiff then found and being in and upon the said premises; of great value, to-wit of the value of $2,000, as a distress for the said sum of money so pretended to be due and in arrears as aforesaid, and under that pretence afterwards, to-wit. &c., sold and disposed of the said goods and chattels for and towards paying and satisfying the said alleged arrears of rent and the costs and charges of the said distress, whereas in truth and in

fact, at the time of the making said distress as aforesaid and during all the time aforesaid, a small part only, to-wit the sum of $70 of the said sum of money so pretended to be due and in arrear as aforesaid, was due and in arrear from the plaintiff to the defendant for the rent of the said premises, &c.

The second count after reciting the plaintiff's tenancy, and that the sum of $70 was due as rent, charges that "the defendant not regarding the Statute in such case made and provided, but wrongfully, &c., on &c., in &c., took and distrained for the said arrears of rent certain goods, &c., of much greater value than the amount of the said arrears of rent, to-wit, of the value of $2,000, and thereby took a great and unreasonable distress, &c., when at the time of the taking of the said distress, a certain part of the said goods and chattels so distrained as aforesaid, to-wit, one-tenth thereof then was of sufficient value to have satisfied the said arrears of rent, &c.

The third count stated that the plaintiff was a surgeon, and that certain surgical instruments he used in carrying on his business, were taken by the defendant in the distress for certain alleged arrears of rent, whereas there were at the time on the premises other goods of sufficient value to have satisfied a reasonable distress; and that the plaintiff seized the said surgical instruments and sold them for a much less sum than they were reasonably worth.

The fourth count was in Trover. Plea—not guilty.

At the trial before WELDON, J., at the St. John Circuit in May last, the defendant's counsel took the objection that there was no allegation in the declaration that the plaintiff sold more goods than were required to cover the amount really due, and that the mere taking or selling on a claim of more than was due was not actionable.

The learned Judge directed the jury that the averments in the declaration were sufficient, and that if they found that the plaintiff had seized and sold under a false pretence of more rent being due than was due, the action would lie. A verdict was found for the plaintiff.

In Michaelmas Term last, *S. R. Thomson*, Q. C., obtained a rule *nisi* for a new trial, on the ground of misdirection—citing Tancred *v.* Leyland (16 Q. B. 669). Glynn *v.* Thomas (11 Ex. 870). Stevenson *v.* Newham (13 C. B. 285).

Duff, Q. C., shewed cause in Hilary Term last. The direction was right. The facts in the declaration were all proved, and any defect can only be taken advantage of now in arrest of judgment. If the

sale was in excess of the amount due, the plaintiff is entitled to recover.

S. R. Thomson, Q. C., contra. The only thing covered by the declaration is the seizure. The count is framed precisely as in Tancred v. Leyland, which was held to be insufficient. The jury were directed as if there was a distinct allegation that more goods were sold than covered the rent really due; whereas there was no such allegation.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

It is quite impossible to distinguish this case from Tancred v. Leyland (16 Q. B. 669). The first count of the declaration on which the substantial verdict was taken is in the very words of the declaration in that case, and the Exchequer Chamber there held, on error from the Queen's Bench, reversing the decision of that Court, that the declaration was bad, inasmuch as it disclosed no cause of action. In delivering the judgment of the Court, Parke, B., says, (p. 678)—"As "some rent is admitted to have been due at the time of the distress "the distress itself was not a wrong to the plaintiff below; there is no "allegation that an unreasonable quantity of goods were taken so "as to constitute an excessive distress, and the only questions are, "whether the fact of making a distress for rent, some rent being due, "is rendered illegal by being accompanied by a claim or pretence by "the defendant that more was due than really was due, or by being "followed by a sale of the goods distrained for those pretended "arrears, in the manner described in the latter part of the first count: "It cannot be disputed that an untrue claim or pretence may give a "cause of action, as all untrue statements may, if all the circum-"stances should occur with respect to it, which are necessary to make "a false representation actionable, and amongst others if it had been "followed by any special damage; as if for instance the tenant had "been prevented thereby from joining in the replevin bond, some "friend being ready to join in a bond to secure the true amount, who "would not join in one to secure the amount claimed. Nor can it "be disputed that if a larger quantity of the goods so taken than "was sufficient to raise the amount of the rent in arrear and legal "costs, had been subsequently sold, such illegal sale would have been "illegal and actionable. But it was contended for the plaintiff "in error that putting the construction the most favorable for the "plaintiff below on the allegation in the first count as to the sale, it "had no such import. We agree that every intendment is to be "made for the plaintiff, and that the declaration is to be construed "to contain a sufficient cause of action, after pleading over, if it be

"reasonably capable of such a construction, but we think this alle-"gation cannot be reasonably so understood. The averment is simply "that the goods distrained were sold for the said arrears and costs; "that is for the purpose of satisfying the said alleged arrears and "costs, not for a sum equal to the said alleged arrears and costs, or "so as to raise the said arrears; there is no express or implied aver-"ment that *more goods* were sold than were necessary, to raise the "amount of the arrears actually due, and costs; and all that need "have been proved, if the allegation had been traversed, was that he "sold the goods seized for the purpose of paying the arrears, &c.; "and consequently, by the plea nothing more is admitted. That "being so, the only remaining question is, whether the simple fact of "making a distress, accompanied by an untrue claim or pretence that "more was due than really was due, is actionable. It is said that it "was so at common law; and the argument is therefore founded on "the supposition that the *Common Law* casts a duty on the landlord "distraining to inform the tenant what is the arrear of rent for "which he distrains. We think that the Common Law casts no such "duty on the distrainer."

It is true this was the decision of only five Judges, reversing the judgment of four Judges of the Queen's Bench; but it is a judgment binding on us if it stood as the only case on the subject; but that is not so. The principle was again under consideration in the case of Glynn *v.* Thomas (11 Exch., 870) in error from the Court of Exchequer. There the declaration alleged that the plaintiff had certain premises as tenant thereof to the defendant, and that the defendant wrongfully distrained upon the said premises certain goods of the plaintiff as a distress for alleged arrears of rent, to-wit, the sum of £6 3s. 0d. by the defendant, then pretended to be due and in arrear, and the defendant wrongfully remained in possession of the said goods under color of the said distress, until the plaintiff was compelled to pay, and did pay, to the defendant the pretended arrears of rent and costs of the distress, in order to regain possession of the goods, whereas in truth a small part only, to-wit, £1 16s. 9d. of the said pretended arrears was due. Exchequer Chamber held (*dissentiente* Crompton, J.) that the count disclosed no cause of action, for as the distress was lawful, the defendant was entitled to a tender of the rent really due, and upon his refusal to accept that sum, the plaintiff's course was to replevy the goods. Coleridge, J. in delivering the judgment of the Court, refers to Tancred *v.* Leyland thus:—"For the plaintiff in error, the case mainly relied on was Tancred *v.* "Leyland in error, and that case decided that the merely taking goods "in distress on a claim of more rent being in arrear than was in fact "in arrear, and selling them on such claim, was not actionable; the

"first, because the distrainor for rent is not bound by the amount for "which he claims to distrain, and though he takes, alleging that he "does so, for an amount exceeding the real arrears, he may sell after-"wards only for that which is really due; the second, because from a "mere allegation that the distrainor sold for the alleged arrears and "costs, it is not to be inferred that he sold more than was necessary "to raise the amount of arrears actually due. In the same judgment "it was stated to be clear law, as undoubtedly it is, that if the untrue "claim had been followed by a sale of more of the goods taken than "was sufficient to raise the amount of rent really in arrear, with legal "charges, a sufficient cause of action would have arisen."

But the authorities do not end here. The principle involved was again brought up in the Exchequer Chamber in the case of French v. Phillips (2 Jur. N. S., 1169; 38 Eng. L. & E., R. 390), in which case the declaration was almost precisely in the words of the first count of the declaration in this case. It stated that the defendant wrongfully and injuriously seized and took divers goods, &c., of the plaintiff; that is to say, &c., of great value, to-wit, of the value of £30 as a distress for arrears of rent, to-wit, £13 10s., then pretended to be due, and under that pretence wrongfully sold the said goods and chattels as such distress, for the said alleged arrears of rent and the costs and charges of the distress, and of the appraisement and sale of the said goods and chattels, whereas in truth, and in fact, at the time, &c., a small part only, to-wit, the sum of £9—of the said pretended arrears of rent so distrained for was in arrear, on which the jury found for plaintiff £10 10s. due. On the cases of Tancred v. Leyland and Glynn v. Thomas being cited, the counsel for the defendant were stopped by the Court, and after hearing counsel for the plaintiff, the Court unanimously held that the case was not distinguishable from those cited, and the judgment was accordingly reversed.

The rule for a new trial in this case must be made absolute.

Rule absolute.

DesBrisay v. The Commissioners of the E. & N. A. Railway.

April 12th.

Where a plaintiff was nonsuited for not complying with an undertaking to give material evidence in a particular County, the Court set aside the nonsuit on payment of the costs of the trial and of the motion to set aside the nonsuit.

The Court cannot take judicial notice that a vessel lying "near the mouth of Richibucto Harbor" is in the County of Kent.

This was an action for negligence in not delivering certain goods of the plaintiff which the defendants had undertaken to convey from St.

John to Richibucto. The venue had been laid in the County of Kent and changed by the defendants to St. John, and the plaintiff obtained an order to restore it to Kent, upon entering into an undertaking to give material evidence of some matter arising in that County.

It appeared on the trial before WELDON, J., that the goods had been shippod at Shediac in the County of Westmorland, in a schooner bound for Richibucto, which vessel was burnt before reaching her destination. In order to satisfy his undertaking, the plaintiff called a witness who proved that he was on board of the vessel near the mouth of Richibucto harbor, after the fire took place; but there was no evidence to show that the vessel was burnt in the County of Kent, or even that the place where the witness was on board of her was in that County. The plaintiff was therefore nonsuited; A rule *nisi* having been obtained to set aside the verdict.

Watters, Q. C., showed cause in Hilary term, and

S. R. Thomson, Q. C., was heard in support of the rule.

Cur. adv. vult.

RITCHIE. C. J., now delivered the judgment of the Court.

This was an action against the defendants for negligence in carrying and not delivering certain goods. The plaintiff had the venue restored to Kent on an undertaking to give material evidence of some matter arising in that County. We have looked very carefully over the Judge's notes and can find no evidence showing a compliance with that undertaking. The goods appear to have been destroyed by fire when on board a vessel, in which they had been shipped by the defendants from Shediac. The only evidence of anything connected with the transaction, or the goods, or their loss, which was relied on as having taken place in the County of Kent, was that of a person who spoke of having been on board the vessel after the fire, "near the mouth of Richibuto harbor." There is nothing to show us, as a matter of fact, that the vessel was then in the County of Kent. If such was the case, we have no personal knowledge on the subject, and could not use it if we had, and we certainly cannot take judicial notice of it. In Brune v. Thompson (2 Q. B., 789) where the plaintiff, having undertaken to give material evidence in London, produced only a record from the Tower, but gave no evidence that the part of the Tower from which the record came was in London, it was held that he was rightly nonsuited, and on a motion to set aside the nonsuit, the Court refused to act upon affidavits then produced as to the situation of the Tower. Lord Denman says: "A nonsuit is to be the "penalty of not producing evidence in satisfaction of the undertaking.

"* * * We need not inquire whether the place is within London. "The plaintiff has not complied with his undertaking, because he "gave no proof at the trial that it was so." The nonsuit in this case was therefore right; but, as was done in Brune v. Thompson, if the costs of the trial and of this motion are paid to the defendant's attorney on or before the 1st of July next, the rule will be absolute for a new trial, otherwise the rule must be discharged.

Rule accordingly.

DOE on the demise of ROBINSON v. CHASSEY.

APRIL 12th.

The Court cannot take judicial notice that the person who signs a certificate of registry, endorsed upon a deed, was not the Registrar at the time the deed was recorded; and in the absence of any such proof, it must be presumed that the Registrar rightly certified.

A certificate dated in 1866, stated that the deed had been registered the 29th April, 1836. *Quære*, whether the certificate should not have been made at the time the deed was registered.

Ejectment, tried before WILMOT, J., at the York Sittings after last Trinity Term, when a verdict was given for the plaintiff.

One of the deeds under which the lessor of the plaintiff claimed title, and which was received in evidence as a registered deed, purported to have been registered in April, 1836, but the certificate of registry of that date endorsed on the deed was not signed. A second certificate, dated the 23rd June, 1866, and signed by the Registrar, was endorsed on the deed, stating it to have been registered the 29th April, 1836. It was objected by the defendant that the Registrar who signed the certificate, was not the Registrar at the time the deed was recorded; but no evidence was given to prove this fact. The endorsements appearing on the deed are set out in the judgment of the Court. A rule *nisi* having been obtained for a new trial on the ground of the improper reception of the deed in evidence.

A. R. Wetmore, Q. C., shewed cause in Michaelmas Term last, and

W. W. Street was heard in support of the rule.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

The question in this case is whether a deed from Thomas Baillie to

to the lessor of the plaintiff, on which plaintiff's right to recover depended, was properly received in evidence. The deed was dated the 18th April, 1836, and duly acknowledged the same day. The following endorsements appeared on the deed:

Received 29th April, 1836. No. 6452.

"New Brunswick, } No. 6452.
"York County. }

"Registered in Book L of Records, pages 58, 59, 60 and 61, this "twenty ninth day of April, 1836.

(No Signature).

"New Brunswick, } No. 6452.
"York County, }

"Registered in Book L of Records, pages 58, 59, 60 and 61, this "twenty ninth day of April, 1836, which I certify this 23rd day of "June, A. D. 1866.

A. D. YERXA."

The Act in force for the registry of deeds at the time this deed purports to have been registered, was the 26 Geo. 3, c. 3, by the fifth section of which it is enacted, "that every such deed, &c., which "is so to be registered, shall be produced to the said Register and "Registers at the time of entering and registering the same, who "shall endorse a certificate on every such deed, &c., and therein "mention the certain day on which such deed, &c., is so entered and "registered, and shall sign the said certificate when so endorsed, "which certificate shall be taken and allowed as evidence of such "respective Registers in all Courts of Record whatsoever," &c.

The only objection taken at the trial to the reception of this deed in evidence, was that the Register who signed the certificate was not the Register at the time the deed was recorded. No evidence was offered to establish this, and we cannot take judicial notice of this fact, if such was the case. Without saying what effect this might have had if proved, in the absence of any evidence on the point, we must presume the Register rightly certified. No point was raised at the trial as to the effect of the certificate being dated in 1866, and no objection taken that it should have been made at the time the deed was registered, though it was mentioned at the argument; but we are not called on to express any opinion on a question not now before us, it having been passed over at the trial.

Rule discharged. (a)

(a) Allen J., took no part in this case.

FOLEY *v.* TUCKER.

APRIL 12th.

Defendant lost a cow, which he suspected to have been stolen by the plaintiff; he reported the facts to the Chief of the Police, who told him, in the presence of a policeman, that he had better arrest the plaintiff. He then went to the plaintiff's shop with the policeman, and directed him to take the plaintiff in charge, and the policeman arrested the plaintiff and detained him several hours, when the cow was found, having strayed from the defendant's field. In the action for false imprisonment, the policeman stated, in answer to a question from the plaintiff's counsel, that he would not have arrested the plaintiff without the direction from the defendant. Held, that the question was proper,. *Quere*, whether the defendant's counsel had a right to ask the policeman on cross-examination, whether he did not make the arrest in consequence of the direction from the Chief of the Police. Though the evidence was improperly rejected, it is no ground for a new trial, as the defendant, being a trespasser, by directing the arrest, the verdict must have been in favor of the plaintiff.

The Police Act, 11 Vict., c. 13, § 22, does not authorise the arrest without warrant, of known residents of the place; nor is a person who acts as a principal in directing a policeman to make an arrest, entitled to notice of action under that Act.

This was an action of trespass for false imprisonment, tried before ALLEN, J., at the St. John Circuit in August last, in which a verdict was found for the plaintiff for $100 damages. The facts are fully set forth in the judgment of the Court.

In Michaelmas term last, *A. R. Wetmore*, Q. C., moved for a new trial on the following grounds:—1. The improper admission of the question to the policeman, whether they would have arrested the plaintiff without the defendant's directions. 2. The improper rejection of the instructions given by the Chief of the Police. 3. Misdirection as to the construction of the Act 11 Vict., c. 13, § 22, (3 Local Stat. 115), and as to the defendant being entitled to notice of action. McNicholl *v.* Gray (2 Allen 73). 4. Excessive damages.

The Court granted a rule *nisi* on the second ground only, saying that the construction of the Act was too clear to admit of any question, and that it did not apply to such a case as this.

Steadman, in Hilary term last, showed cause, contending that if the question had been answered in the affirmative it would not have affected the liability of Tucker, and that, therefore, the verdict should not be disturbed. (Graham on New Trials 203 & 204).

A. R. Wetmore, Q. C., contra. Large damages are found in this case, because Tucker appeared to have been the sole party to the arrest; but if it had been shewn that the Chief of Police had ordered the arrest of the plaintiff, it would have affected the damages materially.

Cur. adv. vult.

ALLEN, J., now delivered the judgment of the Court.

This was an action for false imprisonment. The plaintiff was a butcher, residing and carrying on business in St. John, and the defendant having lost a cow, and believing, from information he received, that she had been driven to a slaughter-house used by the plaintiff, went there with a policeman, and saw a hide which he believed to be the hide of his cow. He afterwards saw the plaintiff and asked his permission to take the hide home and shew it to his family, but the plaintiff refused. He, however, went with the defendant to the slaughter-house, where the defendant and his servant again examined the hide, and satisfied themselves that it was the hide of the defendant's cow. The defendant then reported the facts to the Chief of the Police, who said, in the presence of two policemen, one of whom had gone to the slaughter-house with defendant, "You had better arrest Foley, and seize the hide." The defendant and the policeman went the next morning to the market, where the plaintiff sold meat, and the defendant directed them to arrest the plaintiff, saying that he gave him in charge for having the hide in his possession. The plaintiff was arrested by the policeman and detained at the station several hours, when it was discovered that the defendant's cow was living and had strayed from his field. The policemen stated that they would not have arrested the plaintiff but for the directions of the defendant. The defendant's counsel proposed to ask one of the policemen, on cross-examination, whether he did not make the arrest in consequence of directions from the Chief of the Police? This question was objected to, and the evidence rejected. It was contended, on behalf of the defendant, that the policemen were acting in execution of the powers given by the Act 11 Vict., c. 13, § 22; that the defendant was acting in their aid, and, therefore, entitled to notice of action by the 23rd sect. of the Act. The learned Judge was of opinion that the policemen, in making the arrest, were not acting in execution of any of the powers given by that Act, which only authorizes the arrest, without warrant, of transient persons, and not of known residents of the place, and, therefore, that notice of action was not necessary; but he left it to the jury to find—1. Whether the policemen acted in the belief that they were in the discharge of their duty and in execution of the powers given by the Act; and, 2, whether the defendant acted merely in aid of the policemen, and in the *bona fide* belief that it was his duty to do so; or, whether he acted as a principal in directing the arrest. The jury found a verdict for the plaintiff with $100 damages, stating that the policemen were not acting in execution of the power given by the Act; and that they made the arrest under the instructions of the defendant as principal.

A rule *nisi* for a new trial was granted on the ground of the

rejection of the question put to the policeman on the cross-examination. If the defendant had merely stated his case to the Chief of the Police, and the arrest had been made by his direction without any further interference by the defendant, this action could not have been maintained; for, as is said in Gringham v. Willey, (4 H. & N. 496,) "a person ought not to be liable in trespass unless he directly "and immediately causes the imprisonment." That the defendant did cause the imprisonment here there is no doubt, as both the policemen swore they would not have arrested the plaintiff without the defendant's direction. The fact of his acting under the advice of the Chief of the Police, and believing that he was justified in what he did, cannot relieve him from liability. If this question had been answered by the policeman in the affirmative, (which we cannot very well see that it could, after what he had already stated,) would that have relieved the defendant? Would he not still have been a trespasser; and could the Judge have directed the jury differently; or is there the least reason for supposing they would have found differently? They could not have found a verdict for the defendant under any circumstances. We think it doubtful whether the proposed question was proper, the defendant being clearly liable as a trespasser, by directing the arrest; but admitting the evidence to have been improperly rejected, the defendant made his own statement of the circumstances, and therefore got the full benefit of any directions given by the Chief of Police. He said in his evidence:— "I reported the proceedings to the Captain of the Police. Looking "at both of us, (i. e. the defendant and the policeman,) I don't know "who he spoke to, he said, 'the case looks very suspicious, and you "had better go to-morrow morning and arrest Foley, and seize the "hide." I thought this was all the authority I required. In pursu-"ance of that direction, next morning I got Hipwell and Hayes, (the "policemen,) to go with me. I told them they knew what they were "directed to do last evening." The defendant's counsel availed himself of all the circumstances in his client's favor, for the purpose of reducing the damages, and he also had the benefit of the Judge's direction. in telling the jury that the defendant appeared to have acted under a mistake, without any malice, and that the plaintiff had aroused the defendant's suspicions, by refusing to allow him to take the hide to his house to be examined by his family. It cannot be said that the damages are excessive; and where it is obvious that the verdict must have been in favor of the plaintiff, we think no ground has been shown for a new trial. When evidence has been improperly rejected, and the fact, which such evidence was offered to establish, was proved by other means; or where, assuming the rejected evidence to have been received, a verdict in favor of the

party offering it would have been set aside, it is not a ground for a new trial, Edwards v. Evans (3 East. 451), Crease v. Barrett (1 C. M. & R. 933).

Rule discharged.

Dow and Wife v. Dibblee.

April 12th.

It is not a ground of challenge to the array, that some of the jurors named in the Sheriff's panel are not on the list of persons qualified to serve as jurors, filed under the Act 18 Vict., c. 24.

Land was conveyed to a married woman, for life, for her separate use; it was managed under her direction, and the labor paid for by the produce of the land, the husband not interfering except as her agent. Held, 1st. That under the Rev. Stat., c. 114, the crop, when severed, did not become the property of the husband, and was not liable to seizure under an execution against him. 2nd. That an action for seizing the crop, under an execution against the husband, was rightly brought in the name of husband and wife.

Tresspass against the Sheriff of Carleton, for seizing and taking certain hay and grain, the separate property of the wife, under execution issued out of the Supreme Court, at the suit of one of the creditors of the husband. The hay and grain were grown on land held by Mrs. Dow, as tenant for life, and which had been conveyed to her by her brother. It was worked under her sole management and direction, and without the husband's interference, except as her agent, the labor being paid for by the produce of the farm. At the trial before Wilmot, J., at the last Carleton Circuit, the defendant's counsel challenged the array on the ground that several of the jurors on the panel were not on the Sheriff's list of persons qualified to serve on juries. The learned Judge ruled that this was a proper ground of challenge to the polls but not to the array. 2. It was objected that the hay and grain, after being severed from the land, became the personal property of the husband, and as such liable to be seized for his debts. 3. That if not so liable, the husband was improperly joined in the action. The ruling of the learned Judge was against the defendant on these points, and a verdict was found for the plaintiffs.

S. R. Thomson, Q. C., in Michaelmas Term last, obtained a rule *nisi* for a new trial on the above grounds.

D. S. Kerr, Q. C., shewed cause in Hilary Term last. 1. The distinction between a challenge to the array and to the polls is laid down in Coke on Littleton (156 b.) A challenge to the array is in respect of the cause of unindifference or default in the Sheriff or

other officer that made the return, and not in respect of the persons returned. Challenge to the polls is a challenge to the particular persons. 2. The intention of the Statute (1 Rev. Stat. 294), was clearly to give the wife the profits of the land, otherwise its object would be entirely defeated. 3. The Statute did not change the law with reference to the mode of bringing the action, the husband is joined for the sake of conformity.

Fraser, contra. The Act 18 Vict., cap. 24, § 3, requires a list of persons qualified to serve on juries to be made up annually; and Sect. 5 declares that no person shall be empanelled to try any issue, whose name is not on the Sheriff's list. The want of this qualification is a good ground of challenge. [ALLEN, J.: It is ground of challenge to the polls, but not to the array, Rex. *v.* Edmonds, 4 B. & Ald. 471.] Those not on the Sheriff's list were not good and lawful jurors. [RITCHIE, C. J.: Not being a good and lawful man was ground of challenge to the poll at common law but not to the array. It would be a dreadful thing if the putting one unqualified person on the panel was a ground of challenge to the array. There is nothing in the point. See Reg. *v.* Mellor (4 Jur. N. S. 214), Mansell *v.* Reg., *Ibid*, 434.] 2. Severance from the land made the hay and grain the husband's property. If the husband had sold it, the wife could not have brought Trover for it. [RITCHIE, C. J.: She and the husband together could, for the third party could not set up the sale which would be an unlawful act. ALLEN, J.: The Statute introduces principles of equity into common law, and you must combine the two in construing the Act. The husband cannot sell her separate property without her consent.] While the husband and wife live together, she cannot take any control of the property. Such an anomaly could not exist. Could the husband expend money in erecting buildings on the land without its being liable for his debts? 3. The wife should have sued in her own name if it was her separate property; or else she should have sued in equity, treating the Sheriff and the judgment creditor as trustees holding her separate property.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

This was an action of trespass against the defendant, the Sheriff of Carleton, for seizing and taking certain hay and grain under an execution of Francis Clementson issued on a judgment obtained by him against Henry Dow, the husband. The Sheriff levied on the crops while growing, and sold them after they were harvested and in the barn. The land on which the hay and grain were grown had been

conveyed to Mrs. Dow, the wife, in 1864, for her life, by her brother, F. W. Hatheway. The farm was worked under her direction and for her benefit, partly by persons on shares, and partly by hired labor paid for by the produce of the farm, the husband, so far as he interfered, acting avowedly as her agent.

By the Revised Statutes, cap. 114, § 1, it is enacted "that the real "and personal property belonging to a woman, before or accruing "after marriage, except such as may be received from her husband "while married, shall be owned as her separate property, so as to "exempt it from seizure or responsibility in any way for the debts or "liabilities of her husband, and shall not be conveyed, encumbered "or disposed of, without her consent." On the part of the defendant it was contended that the moment the crop was severed it became personal property, and, as such, vested in the husband, and so became liable to be seized under an execution issued against him. But the fact of the crops becoming personal property did not in any way alter the married woman's rights under the Act; it would still be owned as her separate property; and we think the Judge rightly directed the jury that the property was not liable to her husband's debts, more particularly as the learned Judge coupled with that direction the qualification, if the husband, with reference to the property, acted as the agent of the wife, which in this case the jury, in finding for the plaintiffs under such qualified direction, must be taken to have found. It was also urged that if the wife is to be treated as the separate owner, the action should have been in her individual name, or the action should be in a Court of Equity, treating the Sheriff and Clementson as her trustees. We cannot see the slightest grounds for the last proposition. If the property belongs to the wife, having accrued to her after marriage, it is owned as her separate property, so as to exempt it from seizure by the Sheriff or execution creditor of her husband. If, in defiance of this statutory protection, the Sheriff or creditor seize it, upon no legal or equitable principle that we are aware of, can either of them, by interfering with property they had no right to touch, clothe themselves with any legal or equitable right in the property, or establish between themselves and the owners the relationship of trustees and *cestui que trusts.* If the property, real or personal, is to be owned as the wife's separate property, and so exempt, and not to be disposed of without her consent, it follows, as a necessary consequence, that for any injury to it she is clearly the meritorious cause of action, and we think that in this case the husband and wife rightly joined in bringing the action. It is laid down in Chitty on Pleadings, p. 34, "that for rent or other cause of action accruing during the marriage "on the lease or demise or other contract relating to the land, or

"other real property of the wife, whether such contract was made "before or during the coverture, the husband wife *may join* or *he may sue alone*"—(citing Stra., 229; 1 Wils., 224; Com., Dig., Bar., & Feme, X. Y.)—"When a lease for years has been granted to husband "and wife, and the lessor evicts them, they may join, or the hus- "band may sue alone"—(citing Bro., Abr., Bar., & Feme, pl. 25; 2 Mod., 217; Cro. Jac. 399; Bulst., 163)—"and in all actions for a "profit, &c., accruing *during coverture* in right of the *real* estate of "the wife, they may join, or the husband may sue alone, as in debt, "for not setting out tithes payable to the wife"—(citing Com., Dig., Bar. & Feme, X.: 2 Wils., 423–4; Cro., Jac., 399; Cro., Eliz., 608.

If this would be so by the principles of common law, it is clear that it would be so in this case, where statutory rights and privileges attach to the property on behalf of the wife; more particularly so as against the husband's creditors. The rule, therefore, must be discharged.

GILBERT *v.* STOCKTON.

APRIL 16th.

A promise by an Underwriter to pay the amount of the loss claimed by the assured, is *prima facie* evidence of the right of the assured to recover, and of the amount of the loss; and, if unanswered, entitles the assured to recover the amount so admitted.

A new trial, on the ground of surprise, was refused, where the defendant knew, the day before the trial, of the evidence the plaintiff intended to give, and might have applied for a temporary postponement of the trial in order to answer the evidence.

This was an action against the defendant as one of the underwriters on a policy of insurance for $2,000, on a cargo of deals shipped from Shediac to England on board the bark *Nashwaak*. The policy provided that in case of loss, such loss was to be paid in sixty days after proof of loss, and adjustment and proof of interest in the assured should be made and presented at the office of the broker of the insurers; but no partial loss or particular average should in any case be paid unless amounting to five *per cent.* on the whole value of the goods. Also, that if the assured should have made any other insurance upon the goods prior to that date, then the insurers should be answerable only for so much as the amount of such prior insurance might be deficient towards fully covering the property; and in case of any subsequent insurance, the insurers should nevertheless be answerable for the full extent of the sum by them subscribed on this policy. That the interest of the assured in the policy or any part thereof, or in the property insured or any part thereof, should

not be assignable without the written consent of the broker; and in case of transfer or termination of any such interest of the assured, either by sale or otherwise without such consent, the policy should be void.

At the trial before ALLEN, J., at the last Westmorland Circuit, it appeared that the vessel ran on shore near Canso, on the 17th October, 1864; that a portion of the deals were thrown overboard to lighten the vessel; that she was got off and repaired and reloaded, and afterwards arrived in England. It did not appear what portion of the deals were lost by being thrown overboard, or what the cargo sold for in England; but the plaintiff claimed $842 as the amount of his loss, which he alleged had been adjusted at that sum. This adjustment was furnished to the broker as part of the preliminary proof in June 1865, the plaintiff offering at the same time to furnish further preliminary proof, if required. The principal evidence relied on by the plaintiff, was a promise by the defendant to pay the amount claimed. The plaintiff stated that after he had delivered the preliminary proof to the broker, he called on the defendant at his office, and shewed him the policy and the Captain's protest relative to the loss, and stated that he had furnished the preliminary proof; that the amount of the loss was $842, and that the broker had refused to pay for three months; that the defendant then went to the broker's office, and on his return, in about half an hour, said that the plaintiff's claim ought to be paid, and as far as he was concerned it should be paid; that he would pay,—that he did not want any quibbles or technicalities, and would not have his name mixed up with it.

The plaintiff had drawn a bill of exchange for £520 on his agent in England, against the proceeds of the cargo, which was endorsed to the Westmorland Bank, and the bill of lading was also assigned to the bank as collateral security for the payment of the bill of exchange. The policy was effected after the assignment of the bill of lading.

The plaintiff proved that the value of the cargo in England would have been £750 sterling; that he had the remaining interest in it after payment of the bill of exchange, and that he had never received any of the proceeds of the cargo, or any benefit from the insurance; but there was conflicting evidence on this point.

The defence was, principally, that the plaintiff's loss had been paid through the Westmorland Bank, by the sale of the deals in England, and by the proceeds of an insurance effected upon them by the bank;

it appeared, however, that not more than £450 sterling had been received by the bank and credited to the plaintiff against the bill of exchange. It was also objected, that the policy was void by the assignment of the plaintiff's interest to the bank, without consent of the insurers.

The learned Judge directed the jury, that if the defendant, with knowledge of all the facts, promised unconditionally to pay the amount for which he was liable on the policy, the plaintiff was entitled to recover, That at the time of the insurance, the plaintiff had an equitable interest in the cargo, which he had not transferred, and that the subsequent insurance by the bank did not affect his rights under the policy. The jury found a verdict for the plaintiff for $71, stating that there was an unconditional promise by the defendant to pay the loss.

C. W. Weldon, in Michaelmas term last, obtained a rule *nisi* for a new trial on the ground of misdirection, and also on the ground of surprise, by the evidence given of the defendant's promise; the defendant's affidavit stating that he had no recollection of seeing the plaintiff in his office, or having any conversation with him about his claim, or making any such promise to pay as the plaintiff had stated in his evidence. The defendant's attorney also swore that he was entirely taken by surprise by the evidence given by the plaintiff of his conversation with the defendant, and knew nothing of the plaintiff's intention to give such evidence till the day before the trial, and was altogether unprepared to meet it.

A. L. Palmer, Q. C., shewed cause in Hilary Term last, and produced affidavits of the plaintiff and his attorney, contradicting those on the part of the defendant with reference to the surprise. Hewlett *v.* Cruchley (5 Taunt. 277). On the other ground, he contended that the defendant's promise was equivalent to adjustment. It was not conclusive on the defendant, but it was *prima facie* sufficient, and shifted the burthen of proof on the defendant, just as a defendant in an action on a promissory note might shew fraud or want of consideration. An adjustment was evidence that everything had been done to make the underwriters liable; but notwithstanding the admission, he might shew that he was never liable under the policy. 2. Arn. Ins. 1202, Luckie *v.* Bushby (13 C. B. 870). The promise in this case was made after a full investigation of the facts, and being unanswered, was sufficient to complete the plaintiff's right, the defendant having failed to make out either that the plaintiff had no insurable interest, or that he had assigned away his interest in the property insured, or that the loss had been paid him by the Bank.

There was evidence of the loss, independent of the defendant's promise. The cargo shipped was worth £750 sterling; all that the Bank realized both from the cargo and the insurance in England was less than £450 sterling. The difference was evidence of the amount of the loss. In Hare v. Travis (7 B. & C. 14), there was no evidence of the amount of damages before the deviation. Here, the fact of the deals being thrown overboard, their original value, and the amount which they sold for in England, were evidence from which the jury might find the amount of loss. By the terms of the contract the plaintiff was not prohibited from effecting subsequent insurance; and even a prior insurance, if he had not received a full valuation, would only prevent him from recovering beyond the difference. Bruce v. Jones (1 H. & C. 769; 9 Jur. N. S. 628). The amount received by the Bank was after action brought.

C. W. Weldon, contra. The defendant's promise to pay was not binding unless it was founded on a consideration of previous liability, and the Judge should have told the jury that the plaintiff could not recover on the promise alone. [RITCHIE, C. J.: Suppose the plaintiff had just proved the policy, and then proved the defendant's promise to pay, would not that be sufficient *primâ facie* evidence?] The evidence of the amount of the loss was most meagre. [RITCHIE, C. J.: The defendant may have had evidence of all the facts of the loss, the sale of the deals in England, the amount received by the Bank, and satisfied himself upon the question before he made the promise.] There was no evidence that the loss amounted to five per cent. of the value of the cargo. [ALLEN, J.: Was not the promise to pay an admission of the amount of the loss?] The plaintiff had been fully indemnified by the proceeds of the sale of the deals and the insurance in England, therefore there was no consideration for the defendant's promise. The plaintiff would only be entitled to recover the difference (if any) between the sum received by the Bank for his benefit, and the $2,000, therefore there was a misdirection as to the double insurance. 2. The affidavits show that the plaintiff concealed the fact of the alleged admission. If the defendant made such an admission he would have committed a fraud on the other underwriters, and the fact of their defending this suit is confirmatory of the defendant's denial. The defendant went prepared to try the case on the merits, and had no opportunity of answering the case set up by the plaintiff.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

The defendant's admission of the loss and his promise to pay, after

apparently a full investigation and consideration of the subject, relieves the case from any of the objections stated by Mr. Weldon, and fully warranted the jury in finding as they did. 2 Arn. Ins., 1203; Marsh Ins. 510; Herbert v. Champion (1 Camp. 133).

On the question of surprise, we think the affidavits on the part of the defendant are fully answered. The plaintiff's affidavit states that he distinctly recollects the conversation with the defendant and wrote to him afterwards calling his attention to his promise to pay; that about three weeks before the trial he called upon the defendant's attorney respecting his claim, and told him that the defendant had promised to pay it, and that he (the plaintiff) could prove it. Mr. Moore, the plaintiff's attorney, also swears that the plaintiff informed him of the defendant's promise, before the action was brought. Admitting that the defendant's attorney may have misunderstood the plaintiff, and may not have known, before he went to Dorchester to attend the trial, that the plaintiff intended to rely on an admission of the defendant; he had that information, according to his own affidavit, the day before the trial; and if he was then taken by surprise, and was unprepared to meet such evidence, he might have applied to postone the trial for a few days until he could obtain the defendant's attendance. Having gone to trial without the defendant's testimony, after an intimation of the evidence the plaintiff intended to give, we think he has not shown sufficient ground for setting aside the verdict.

Rule discharged. (*a*)

(*a*). A new trial will not be granted on the ground of newly discovered evidence, where the party applying was aware of the existence of the evidence before the trial, and might, on application, have obtained a reasonable postponement of the trial until he had obtained such evidence. O'Grady v. Dwyer, (10 Irish Com. L. R. 440).

WORTMAN v. AYLES and another.

APRIL 16th.

Under the Registry Act, (1 Rev. Stat. c. 112), a deed from A to B, expressed to be "for and in consideration of the sum of —— lawful money of the Province," *habendum* to B, his heirs and assigns, but without any declaration of the use, is a sufficient conveyance of the land to B.

Semble,—That it sufficiently appeared that the consideration of the deed was money; and the amount of consideration being unimportant, that the deed might operate either as a deed of bargain and sale, or as a feoffment.

In trespass *quare clausum fregit*, tried before ALLEN, J., at the last Albert Circuit, the plaintiff, for the purpose of proving title to the

land, put in evidence a deed of bargain and sale, in which the amount of the consideration was left blank, being set out as "for and in con-"sideration of the sum of —— lawful money," &c. It was objected that as there was no valuable consideration nor declaration of uses expressed in the deed, it conveyed no estate. A verdict having been given for the plaintiff,

A. L. Palmer, Q. C., obtained a rule *nisi* for a new trial on the ground of misdirection.

Steadman shewed cause in Hilary term. It is not necessary to state the amount of the consideration. It is sufficient if it is expressed to be for money, as in this deed. The words must be taken to imply that some money was paid, and the amount is immaterial, (4 Kent's Com. 465, Shep. Touch. 514). The deed would at all events operate as a feoffment.

A. L. Palmer, Q. C., contra. This deed cannot operate as a deed of bargain and sale, for there is no consideration stated and no declaration of uses. [ALLEN, J.: Admitting that; could it not operate under our Registry Act? Rev. Stat.. c. 112, §10]. Nothing can operate as a conveyance under the Statute which would not be one at common law, for the term "conveyance" cannot be carried further than its signification at common law. [ALLEN, J.: Would not a deed of gift be a conveyance, and pass the title under our Act?] It has never been decided whether the law of feoffments apply to this country; and it has been decided in some of the United States not to be applicable. [ALLEN, J.: The Legislature must have considered that the law of feoffments was applicable here, when they substituted registry of the deed for livery of seisin, a feoffment being the only description of conveyance to which livery of seisin could apply; and in McLardy *v.* Flaherty (3 Kerr. 445), the application of the doctrine of livery of seisin was recognized]. This is not a feoffment; and if it was, there is no declaration of the use, and the resulting trust comes back to the grantor, (3 Bacon Ab. 607; Coke on Littleton 271 b.) It is necessary that a conveyance should have either a consideration or a use expressed, otherwise the use results to the grantor, (8 Bacon Ab. 237; 2 Wash. Real Prop. 615). Mildmay's Case (1 Rep. 175).

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

The question in this case is, whether any estate passed to the grantee under a registered deed in the following form:—

"Know all men by these presents, that Ralph Ayles, of Coverdale, "in the County of Albert, and Province of New Brunswick, farmer, "for and in consideration of the sum of —— lawful money of said "Province, to the said Ralph Ayles in hand, well and truly paid by "Charles Ayles, of Coverdale aforesaid, the recept whereof is hereby "acknowledged, hath granted, bargained and sold, and by these "presents, doth grant, bargain and sell, unto the said Charles Ayles, "his heirs and assigns, a tract of land situate in Coverdale aforesaid, "&c., (here follows the description), together with all the estate, "right, title, interest, dower, right of dower, claim, or demand, of the "said Ralph Ayles, of, in, or to the said described and bargained "premises, with the appurtenances; to have and to hold the before "described premises with all the improvements and privileges belong-"ing to the same, unto the said Charles Ayles, his heirs and assigns, "forever. And the said Ralph Ayles, for himself, his heirs, execu-"tors and administrators, doth hereby, covenant to, and with, the "said Charles Ayles, his heirs, and assigns, that he is lawfully seised "of the before granted and bargained premises, and hath good right "to bargain and sell the same in manner and form as before written, "and that he will warrant and forever defend the same, unto the said "Charles Ayles, his heirs and assigns, against the lawful claims or "demands of all persons whomsoever. In witness whereof," &c.

It was contended that there must be either a valuable consideration or a declaration of the uses of the conveyance, otherwise there would be a resulting use back to the grantor, and that by the statute of uses (27 Hen. 8, c. 10), the legal estate was transferred to such resulting use.

The rule which requires a deed of bargain and sale to be founded on pecuniary consideration, is held to be matter of form only, and sufficiently complied with if the conveyance *purport* to be so founded; and for this purpose any trivial sum may be inserted. It is also immaterial whether the sum so inserted be actually paid or not. 1 Steph. Com. 495. In Cruise's Dig. Title 'Deed,' c. 9, § 20, it is said, that if a person in consideration of "a certain sum of money" bargains and sells, this is a good consideration to raise a use without an averment of any sum in certain; for the quantity of the sum is not material, as any sum, however small, is a sufficient consideration. In the American cases cited from Washburn on Real Property, 613, the words "for value received," and "a certain sum in hand paid," were held to be sufficient.

The statement in the deed in this case, "lawful money of New Brunswick," shews us clearly that a pecuniary consideration was intended to be given for the land, as if the words had been "a certain sum of money." The amount not being material, all that is neces-

sary to appear is that the consideration was 'money' or something valuable. We think, under these authorities, that this deed might operate either as a feoffment, or a bargain and sale. But admitting that it could not so operate, is it not good as a conveyance of land under the registry Act?

By the 1 Rev. Stat., c. 112, § 10,—"Every conveyance duly ac-"knowledged and registered, shall be effectual for transferring the "lands therein described, and the possession thereof according to "the intent of such conveyance, without livery of seisin, or any "other Act."

The word "conveyance" is defined to mean any instrument by which any interest in real estate may be transferred or affected (1 Rev. St., 462).

The case of Doe d. Wilt v. Jardine (Bert. R. 142), decided while the Registry Act, 26 Geo. 3. c. 3, was in force, seems to us to settle this case. There the deed was in form a release, and was contended to be inoperative, because there was no precedent estate in the grantee on which it could operate. Chipman, C. J., said: "I am dis-"posed to rest my judgment entirely on the Act of Assembly, 26 "Geo. 3, c. 3, § 10, which was evidently intended to lay down a broad "rule, to regulate the transfer of lands in this Province, without ref-"erence to particular forms or modes of conveyance. * * * It was "argued on the part of the plaintiff that a conveyance to be good "under this Act must tally with some technical form of conveyance "known to the law of the mother country. If an inquiry into this "point were necessary in every instance, it would certainly tend to "frustrate the evident object of the Act, which is to facilitate and "simplify the conveying of lands." Parker, J., in the same case, says: "It is impossible, I think, to read the 10th section of the 26th "Geo. 3, c. 3, and the 2nd Sect. of 52 Geo. 3, c. 20, without being "satisfied of the intention of the Legislature not to bind us to the "same forms of conveyancing as are used in England. Indeed, I "conceive the object of the Legislature clearly was to prevent such "questions as these arising, and to set up a standard for ourselves by "which the validity of a deed, duly registered, might be tested."

It is a rule of law, that the construction of deeds ought to be favorable, and as near to the apparent intent of the parties as possibly may be, and as the law will permit. Parkhurst v. Smith (Willes' R. 332; Shep. Touch. 88). In Roe v. Tranmer (2 Wils. 78), Willes, C. J., says: "The Judges have been *astuti* to carry the intent of the "parties into execution, and to give the most liberal and benign con-"struction to deeds; *ut res magis valeat quam pereat.* By the word "'intent,' is not meant the intent of the parties to pass the land by "this or that particular kind of deed, or by any particular mode or form

"of conveyance, but an intent that the land shall pass, at all events, "one way or other. * * * Although formerly, according to some of "the old cases, the mode or form of a conveyance was held material, "yet in later times, where the intent appears that the land shall pass, "it has been ruled otherwise; and certainly it is more considerable to "make the 'intent' good in passing the estate, if by any legal means "it may be done, than by considering the 'manner' of passing it, to "disappoint the intent and principal thing, which was to pass the "land."

Can any one read this deed, and say that it was not the intention of the parties that the land should pass to the grantee? The deed contains all that is essential to make a valid deed at common law, even if it should be considered that a valuable consideration is not stated; for by the rules of the common law no consideration is necessary to the validity of a deed (2 Prest. Conv. 420). In this deed the names of the grantor and grantee, and the land professed to be conveyed, are sufficiently described. The grantor declares that by that deed he "doth grant, bargain and sell," the land to the grantee, and the *habendum* states that the grantee is "to have and to hold" the same to him and his heirs and assigns forever. To apply the strict and technical rules applicable to conveyances in England, and to hold that such a deed is not sufficient, under our Registry Act, to transfer the title and possession of the land to the grantee would, we think, be entirely to defeat, not only the intention of the parties to the deed, but the object which the Legislature had in view in passing the Act (26 Geo. 3, c. 3), from which the Revised Statute, c. 112, does not materially differ.

If, as the authorities show, the insertion of the most trivial sum in the deed, even one cent, without any proof of payment, will prevent the creation of a resulting trust in the grantor, it shows how entirely technical the rule is, which it is contended must be applied; on what a slight founnation the defendant's case rests; and what injustice would be done if we were bound to give effect to such objections. We think the Registry Act relieves us from applying the strict rules applicable to conveyances in England. The policy of the law of this Province, from its very foundation, has been to simplify and facilitate the transfer of real property, and to ignore, as unsuitable for this country, those considerations of every complex and subtle kind in the English jurisprudence, which Mr. Stephens (Vol. 1, p. 466) describes as having "been elaborated into a highly artificial system, "known under the denomination of conveyancing; a system which "maintains its own separate body of practitioners and professors, "and constitutes a science of itself."

Rule discharged.

BISHOP *v.* ROBINSON and others, Executors of C. E. Bishop.

APRIL 46th.

By agreement, under seal, between the plaintiff and B, the latter rgreed to purchase a vessel, then building by the plaintiff, and to pay him a certain sum per ton when the vessel was launched—$1,400, which had been advanced to the plaintiff, to be deducted from the purchase money. In an action on the agreement for the price of the vessel, the defendant, under notice of set-off, claimed payment for goods delivered to the plaintiff subsequent to the agreement.

Held, that the plaintiff was not estopped by the agreement from showing, in answer to the set-off, that the goods were not delivered as an additional payment, on account of the vessel, or as a sale, but on account of the $1,400, which sum was not paid at the date of the agreement.

A bequest by a debtor to his creditor, of a legacy to the amount of the debt, payable out of the proceeds of certain property, which remains unsold, is no defence to an action by the creditor for his debt.

This was an action of debt for the price of a vessel built by the plaintiff for the testator under an agreement, under seal. The declaration also contained the common counts. Plea—the general issue, with notice of set-off.

At the trial before ALLEN, J., at the last Albert Circuit, a verdict was given for the plaintiff for $1,303. The facts are fully stated in the judgment of the Court.

A rule *nisi* for a new trial having been granted on the following grounds:—1. The improper admission of parole evidence of the $1,400 stated in the agreement to have been advanced to the plaintiff; 2. Misdirection of the Judge in telling the jury that the bequest of the legacy to the plaintiff's son was not a satisfaction of the debt due the plaintiff.

A. L. Palmer, Q. C., shewed cause in Hilary term last. As to the first point—the case of Read *v.* McClelan (1 Allen 81) is in point. It was held there, that the plaintiff's acknowledgement of payment in the deed might be explained by circumstances tending to shew that the condition was made up of the defendant's outstanding liability on certain notes, so as to leave it a question to the jury to say whether the consideration was satisfied. In Carpenter *v.* Buller, (8 M. & W. 209), it was held that a party would not be estopped by his admissions in a deed in an action brought by the other party, not founded on the deed. In this case plaintiff had a right to show that the payment of the $1,400 was made in pursuance of a promise made by the testator at the time the agreement was entered into, and not inconsistent with the language of the instrument itself. No doubt the plaintiff would be estopped in an action on the deed, from showing that the $1,400 was not paid; but when the defendants claimed

payment, under the notice of set-off, for goods delivered by the testator to the plaintiff, the plaintiff was not estopped from showing that those goods were delivered in payment of the $1,400, and not as a separate transaction. If the defendants had sued the plaintiff for the price of those goods, he would have had a right to show that there was no sale of the goods to him, but that they were delivered to him in payment of a preceding liabillty. Secondly—The ruling of the learned Judge must be sustained, for it cannot be said that a bequest of a legacy is a satisfaction of a debt, unless the legacy is paid. The legacy was to be paid out of the proceeds of a vessel, which was proved to be worth not more than half the amount of the legacies directed to be paid out of it.

Steadman contra. 1. If the plaintiff would be estopped in an action on the agreement, from saying that he had not received the $1,400, he is equally estopped from showing that the goods which the defendants claim payment for under the set-off, were delivered in payment of the $1,400, because it amounts to a denial of the payment which he has admitted by the deed, and is inconsistent with it. It is, therefore, not competent for the plaintiff to say that the goods he got afterwards were for the sum acknowledged in the instrument to have been already paid, Baker *v.* Dewey (1 B. & C. 707). 2. It ought to have been left to the jury to say, whether the legacy was not intended as a payment towards the liquidation of the debt.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

This was an action of debt on an agreement, under seal, made between the plaintiff and the testator, dated 5th March, 1864, which recited that Charles E. Bishop had agreed to buy a vessel then building in his ship-yard by the plaintiff, for $16 a ton carpenter's measurement, when finished and launched, Charles E. Bishop to have power to do all things necessary to obtain registry of the vessel, $1,400 which had been advanced to be deducted from the purchase money. An account from the testator's books was read in evidence, commencing 1st January, 1864, and ending 28th January, 1864, showing a balance due plaintiff of $1,500. The plaintiff claimed in answer to defendant's set-off, and was permitted to show, on the trial, that the $,1,400 was not advanced before or at the date of the agreement, but that the testator undertook to make the advance, and that his obligation to do so was the way in which the plaintiff received the $1,400. That at the time of signing the agreement, he had received no part of the $1,400, but that that amount was received after the

agreement in accordance with the testator's undertaking. This was objected to on the ground that such evidence contradicted the deed. The plaintiff did not finish the vessel, and the testator took her off his hands and agreed to finish her himself. There was contradictory evidence as to the rate at which the testator agreed to take her—whether at $14 or $16 per ton. The testator kept the accounts between the plaintiff and himself, and the plaintiff had received $1,586 after date of the agreement. The vessel measured 236 tons, and the defendants held her after the testator's death, and at the time of the trial. A judgment on a bond and warrant of attorney for $2,422 by Charles E. Bishop *v.* John Bishop (the plaintiff) was signed on the 18th June, 1865, and a *fi. fa.* was issued thereon, 22d June, to levy $1,200 debt and $22.20 costs, upon which the sheriff returned as follows:—"Levied on Schooner on the stocks, in J. "Bishop's yard, value $1,000. Sold the same to Charles E. Bishop "for $1,000." The defendants gave evidence of a settlement between the plaintiff and Charles E. Bishop in December, 1865, a few days before his death, in which it was agreed that $1,000 was due the plaintiff on the vessel, at which time Charles agreed, at the plaintiff's request, to leave that sum in his will to one of the plaintiff's sons, in payment of the amount due the plaintiff. The bequest in this will was as follows:—

"I give and bequeath the property I have in a vessel now on the "stocks, built by John Bishop, as follows:—To Clifford, son of John "Bishop, twelve hundred dollars." (Then followed other bequests of his interest in the vessel, amounting to $1,150). "The amount "left to Clifford Bishop to be placed in the hands of his father, as "his guardian." Evidence was given by the plaintiff to disprove the settlement with the testator, and the agreement as to the bequest, and also to show that the judgment had been fully settled. On this state of facts the plaintiff claimed as follows:—

The vessel, 237 tons, at $16 per ton,.....	$3,792	
Balance due plaintiff on settlement,.....	15	
Amount per particulars,.....	103—	$3,910
Deduct am't rec'd by plaintiff, as proved, less the..	$1,400	1,586
Balance due plaintiff,.....		$2,324
Further deduction of $1,400,.....		1,400
		$924

In his direction to the jury, the Judge stated that it was not disputed that the testator had taken the vessel off the plaintiff's hands, and the question was, upon what terms he took her, and he left the

following question to them:—Was there a settlement between the brothers, by which it was agreed that $1,000 was due the plaintiff on the vessel? If there was not, did the testator agree to take the vessel at $14 or $16 a ton? Had the sum of $1,400 been advanced by the testator to the plaintiff at the date of the agreement (March 5th, 1864), or was that sum paid after the agreement, as stated by the plaintiff? He also told them that the will did not affect the case. That if there was a debt due the plaintiff, it could only be got rid of by payment, by release, or by accord and satisfaction, and that the legacy did not amount to satisfaction. If they found for the plaintiff, to allow interest on the balance due. The jury found for the plaintiff, for the value of the vessel, at $14 per ton, deducting $500 for the cost of finishing her, . . . $2,804 00

Less amount of defendant's account, . . .	1,586 00
	$1,218 00
One year and two months' interest, . . .	85 18
	$1,303 18

By this finding the jury negatived the settlement, and also negatived the fact of the $1,400 having been advanced at the date of the agreement.

In the case cited by Mr. Palmer, Carpenter *v.* Buller (8 M. & W. 212), Parke, B., delivering the judgment of the Court, says:—"If a "distinct statement of a particular fact is made in the recital of "a bond or other instrument, under seal, and a contract is made with "reference to that recital, it is unquestionably true that as between "the parties to that instrument and in an action upon it, it is not "competent for the party bound to deny the recital, notwithstanding "what Lord Coke says on the matter of recital, in Coke on Littleton "(352 b.) and a recital in instruments, not under seal, may be such "as to be conclusive to the same extent. A strong instance as to a "recital in a deed is found in the case of Lainson *v.* Tremere (1 A. "& E. 792), where, in a bond to secure the payment of rent under a "lease stated, it was recited that the lease was at a rent of £170, "and the defendant was estopped from pleading that it was £140 "only, and that such amount had been paid. So where other partic-"ular facts were mentioned in a condition to a bond, as that the "obligor and his wife should appear, the obligor cannot plead that "he appeared himself, and deny that he is married, in an action on "the bond (1 Roll. Abr. 873, c. 25). All the instances given in "Comyn's Digest (Estoppel a, 2), under the head of estoppel by mat-"ter of writing (except one which relates to a release), are cases of

"estoppel in actions on the instrument in which the admissions are "contained. By his contract in the instrument itself, a party is "assuredly bound and must fulfil it; but there is no authority to "show that a party to the instrument would be estopped in an action "by the other party, not founded on the deed, and wholly collateral "to it, to dispute the facts so admitted, though the recitals would "certainly be evidence, for instance, in another suit, though between "the same parties, where a question should arise whether the plain-"tiff held at a rent of £170 in the one case, or was married in the "other case, it could not be held that the recitals in the bond were "conclusive evidence of these facts. Still less would matter alleged "in the instrument, wholly immaterial to the contract therein con-"tained, as for instance, suppose an indenture or bond to contain an "unnecessary description of one of the parties, as assignee of a bank-"rupt, overseer of the poor, or as filling any other character, it could "not be contended that such statement would be conclusive on the "other party, in any other proceeding between them." May not the jury, on the question submitted to them, viz: Whether the $1,400 had been advanced to the plaintiff at the date of the agreement, or whether that sum was paid afterwards—be assumed to have found that the sum advanced after the agreement was not a payment on account of the vessel, and therefore that the defendants were not entitled to it as an additional credit; but that it was the original advance which never was made, but which, as between the parties was considered as made, and which the testator was in justice and equity bound to make, and then did make, *nunc pro tunc;* and therefore, though the plaintiff would be estopped from denying the fact that, at the time of executing the agreement, he had been paid $1,400 on account of the purchase, the defendants are not in a position to claim the subsequent advances as a payment on account of the vessel, or as a set-off for goods sold and delivered, because the plaintiff received them on another and distinct account, and, in accordance with the testator's promise, based on the condition that, for the purpose of the agreement, the plaintiff would admit the receipt of an amount not actually paid? We incline to this view of the case; but, as the plaintiff's counsel was willing the verdict should be reduced to $1,000, and the defendant's own evidence proves positively that the testator admitted that sum to be due the plaintiff, we think it would be better to reduce the verdict to that amount, with interest from the date of the settlement.

Rule accordingly.

FROST and another *v.* DISBROW.

APRIL 16th.

One tenant in common cannot maintain an action for money had and received against his co-tenant, for receiving more than his share of the rents and profits of the joint property, unless there is an account settled and balance agreed upon, even though the defendant may have acted as bailiff of the other co-tenants in receiving the rents.

Defendant being a tenant in common with the plaintiffs who were infants, rendered an account, in which he acknowledged a certain sum to be due from him to the plaintiffs, as their share of the rents of the joint property which he had received; the plaintiffs' guardian disputed the correctness of the account, and claimed a much larger sum from the defendant. Held, in an action for money had and received, that such balance not having been agreed to, the plaintiffs were not entitled to retain a verdict for that amount.

Assumpsit for money had and received and on an account stated.—The defendant, in right of his wife, and the plaintiffs were tenants in common of certain property, the rents of which the defendant had received, and was alleged to have retained, and the action was brought to recover the plaintiff's share of such rents.

At the trial before ALLEN, J., at the St. John circuit in August last, it appeared that the rents of the common property were collected by defendant for the benefit of all parties, in pursuance of an understanding with the late Wm. Wright, the plaintiffs' guardian. That in October, 1865, after Mr. Wright's death, the defendant had rendered an account in which he admitted a balance of $275.60 to be due from him as the plaintiffs' share of rents received by the defendant, after deducting payments for repairs, &c.; but that the guardian for plaintiffs at that time claimed a much larger sum to be due. A verdict was given for the plaintiffs for $1,590.60 with leave to the defendant to move to enter a nonsuit, on the ground that the action could not be maintained, by one tenant in common against his co-tenant. A rule *nisi* having been obtained in Michaelmas term last.

Jack, Q. C., shewed cause in Hilary term. This is an exception to the general rule that one tenant in common cannot bring an action against his co-tenant. There was an account stated between the plaintiffs' guardian and defendant, and the latter by collecting the rents of the common property, became the bailiff of the plaintiffs, and as such might be sued by his co-tenant at common law in an action of account, (Coke on Littleton, 172 *a* & 200 *b*). An action for money had and received is equivalent to a bill in equity, and will lie where a bill in equity will lie, the jurisdiction of the law and equity being concurrent in matters of account, (2 Chitty prac. 410; Dinwiddie *v.* Bailey, 6 Ves. 141; Straton *v.* Rastall, 2 Term Rep. 370). If one of the co-tenants makes an agreement to collect the rents and account to the other, paying him his share, why should it

not be binding? [RITCHIE, C. J.: Does that alter the principle, or does it differ from the case of one partner acting for his co-partner?] The fact of the defendant's wife being a tenant in common cannot prevent him from becoming the bailiff of the other co-tenants. The very fact of a request to receive the rents, raises an implied agreement to pay them over: Clarance *v.* Marshall, (2 C. & M. 495); Shaw *v.* Grant, (Berton Rep. 110); Benson *v.* Leeman, (2 Kerr 118); Spurraway *v.* Rogers, (12 Mod. 517); Eason *v.* Henderson, (12 Q. B. 986).

Fraser, contra. The law cited does not apply here. The Statute 3 & 4 Anne, gave a tenant in common an action of account against his co-tenant, but an action for money had and received will not lie. The express contract made with Wright does not alter the case, for the defendant could not set it up as a defence against an action by the plaintiffs. Thomas *v.* Thomas (5 Exch. 28).

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

Assumpsit for money had and received, and on an account stated. The defendant, in right of his wife, was tenant in common with the plaintiffs, and received the rents of the common property, and this action was brought to recover the plaintiffs' share of such rents. The late Wm. Wright represented the plaintiffs, the other tenants in common, and fully acquiesced in the defendant's receipt of the rents for the benefit of all parties.

At law, one partner or tenant in common, cannot in general sue his co-partner or co-tenant in any action in form *ex contractu;* but must proceed by action of account or bill in equity. This rule is founded on the nature of the situation of the parties, the difficulty at law of adjusting complicated accounts between them, and the propriety, arising from the supposed confidence reposed by the parties in each other, of their being examined upon oath, which can generally only be effected in a Court of Equity. 1 Chit. Pl. 39. "By the common "law, joint-tenants and tenants in common had no remedy against "each other, where one alone received the whole profits of the "estate; for he could not be charged as bailiff or receiver to his com-"panion, unless he actually made him so. But now, by the 4 & 5 "Anne, c. 16, it is provided that they, and their executors and ad-"ministrators, may have an account against the others, as bailiffs, "for receiving more than comes to their just share or proportion, "and against their executors and administrators." Bac. Abr. 'Joint-tenants.' (L).

The case of Eason *v.* Henderson (12 Q. B. 986) was cited on behalf of the plaintiffs. That was an action of account, and therefore

does not bear on the present case; but the judgment of the Court of Queen's Bench was reversed in the Exchequer Chamber. See Henderson *v.* Eason (17 Q. B. 701). The defendant in that case occupied the whole farm on his own account, cultivated it and received all the produce and appropriated it to his own use. The Judge ruled in favor of the plaintiffs, in accordance with the decision in 12 Q. Bench, 986; but Parke B. in delivering the judgment of the Court, said: "There is no doubt as to the law before the Statute of "4 Anne, c. 16. If one tenant in common occupied and took the "whole profits, the other had no remedy against him while the ten-"ancy in common continued, unless he was put out of possession, "when he might have his ejectment, or unless he appointed the other "to be his bailiff as to his undivided moiety, and the other accepted "that appointment, when an action of account would lie, as against "a bailiff of the owner of the entirety of an estate. Until the "Statute of Anne this state of the law continued. That Statute "provides, by Sect. 27, that an action of account may be brought "and maintained by one joint-tenant and tenant in common, his "executors and administrators, against the others for receiving more "than comes to his just share or proportion, and against the execu-"tor and administrator of such joint-tenant or tenant in common; "and the auditors are authorized to administer an oath."

On an account which shews an agreed balance between the plaintiff and defendant, the action of account is gone, and the plaintiff may have an action of debt on the arrear or balance of the account; but nothing short of this will be sufficient to alter the nature of the demand, and give the plaintiff an action of debt for the arrears or balance. Baxter *v.* Hozier (5 Bing. N. C. 288).

There the question arose on the plea of *plene computavit* in an action of account against a tenant in common and bailiff. Tindal, C. J., in delivering judgment, says: "The question necessarily arises, "what is such an accounting with the plaintiff as will satisfy this "plea? We think the accounting, which is necessary to satisfy this "allegation, may be inferred from the passage in Fitzherbert already "cited, and the authorities there referred to from the Year-books "(viz., 7 Hen. 4, c. 14, and 34 Hen. 6, c. 43), to be the rendering an "account to the satisfaction of the plaintiff, or an account which "shows *an agreed balance between the plaintiff and the defendant;* for "nothing short of this would be sufficient to alter the nature of the "demand, and to give the plaintiff an action of debt for the arrears "or balance. And again, in the case in the Year-books last referred "to, where the plea was that the defendant, 'after the receipt of the "moneys, and before the writ purchased, himself accounted, together "with the plaintiff, of the same moneys,' and it was objected that

"the plea was bad because a man cannot be judge in his own cause. "The answer given was, that by mutual consent he may. And "indeed, it is obvious that, if the mere fact of rendering a true "account to the plaintiff, though not agreed to by him, were sufficient "to bar the action, a defendant, by pleading *plene computavit*, might "always defeat the object of the action of account, which is, to obtain "an investigation before auditors, and might insist that the truth of "the whole account rendered was a question to be decided before the "jury at *Nisi Prius*." * * * The plea put in by the defendant "on this occasion, that he has rendered to the plaintiff a reasonable "account, is not made out in his favor, unless he can shew that the "account so rendered was one of that description, that the result was "a balance ascertained and agreed upon between the parties."

The case of Thomas *v.* Thomas (5 Exch. 28) seems directly in point. It was held in that case, that an action for money had and received, would not lie by one tenant in common against his co-tenant who had received more than his share of the profits. Parke, B., in delivering the judgment of the Court, says: "It is expressly laid down "that no action of account lay, by the common law, by one tenant "in common against his companion, for taking more than his share "of the profits, unless where he constitutes him his bailiff to receive "them. Now the want of remedy by the common law, was provided "for by the Statute 4 Anne, c. 16, § 27, which enables one tenant in "common to maintain an action of account against the other, as "bailiff, for receiving more than his due share or proportion; in which "case, however, he is entitled to all the rights and indemnities of "a receiver, and consequently would be able to show that the "money had been lost without his default; whereas in an action for "money received to the use of another, the defendant is liable for "the money absolutely. It is clear, therefore, that the Statute of "Anne only gives an action of account, in which the receiver would "be entitled to all just allowances; and if so, that this action for "money had and received, will not lie. * * * It appears to us, there-"fore, that the case of a tenant in common, who receives the whole "of the rent due to himself, and his companion, is analogous to the "case of a tenant in common taking the whole of a chattel into his "possession, in which case neither trespass nor trover lies against "him. The plaintiff's only remedy here is, therefore, by action of "account."

It may possibly be in this case, that the defendant was, as contended by the plaintiffs' counsel, the bailiff of the other co-tenants by virtue of the agreement between him and Mr. Wright; if so, that would have no other effect than to enable an action of account to be brought against him at common law, there being no account settled,

and balance agreed upon, between the parties. We do not think the plaintiffs would be entitled to retain their verdict for the $275.60, the balance acknowledged by the defendant to be due by the account rendered October 5, 1865, because that balance was never agreed to by Perkins, the plaintiff's guardian, he having always claimed that a much larger sum was due from the defendant. As the defendant's counsel offered to allow the verdict to stand for that sum, we might, if the plaintiffs' counsel assented, reduce it accordingly; but as he is unwilling to do so, the rule must be made absolute for entering a nonsuit.

Rule absolute.

SPENCE *v.* TRENHOLM.

APRIL 20th.

Where a jury of view supped and slept at the plaintiff's house after completing the view. Held, no ground for disturbing a verdict for the plaintiff, it appearing that no communication respecting the suit had taken place between the plaintiff and the jury; that there was no inn within ten miles of the place, and no house near except the plaintiff's and his son's, where all the jury could be accommodated; that the jury were taken to the plaintiff's house by the Deputy Sheriff, who attended them, and who objected to their separating; and there was no complaint that the verdict was against evidence.

This was an action of trespass, *quare clausum fregit*, tried before ALLEN, J., at the last Westmorland Circuit, in which a jury of view was sent to inspect the land in dispute, and a verdict was found for the plaintiff. A rule *nisi* was obtained to set aside the verdict on the ground of the improper conduct of the jury of view, in being supplied with food, and sleeping at the plaintiff's house on the occasion of their viewing the premises.

A. L. Palmer, Q. C., shewed cause on a former day in this term, on the affidavits of the Deputy Sheriff, the plaintiff, and two of the jurymen, the substance of which is stated in the judgment of the Court. He contended that the minds of the jury were in no way influenced by anything that passed at the plaintiff's house, and that as he became responsible for their travelling expenses, food and lodging, while employed as a jury of view, it was not material whether these necessaries were furnished at his house or elsewhere.

A. J. Smith, Q. C., contra, contended that the verdict should be set aside, as it was impossible to determine how far the minds of the jury might have been influenced by their treatment at plaintiff's house. The very decorous and correct conduct of the plaintiff and

his family in refraining from alluding to the suit, might have been a means of influencing them. The impropriety of lodging them there could not be relieved by any agreement made between the Sheriff and the plaintiff, as to who should bear their expenses.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

The only ground upon which the rule *nisi* was moved for in this case, was the alleged improper conduct of the jury of view, in being supplied with food and sleeping at the plaintiff's house on the occasion of their viewing the land in dispute. The jury of view was applied for by the plaintiff, and the defendant having declined to bear any part of the expense, the plaintiff became responsible to the Sheriff for the amount. The land in dispute was about fifty miles distant from the Court-house, and. the jury were attended during their absence by the Deputy Sheriff, by whose affidavit it appears that the jury completed their examination of the land in the evening, about dark, and as there was no inn within a distance of ten miles, the defendant's shower offered to take part of the jury to his house for the night, but the Deputy Sheriff objected to their being separated, and as there was no house near, except the plaintiff's, his son's, and the defendant's shower, where all the jury could be accommodated, and they required refreshment, he took them to the plaintiff's house, and asked him to lodge them for the night, which the plaintiff unwillingly agreed to do. The Deputy Sheriff, the plaintiff, and two of the jurors, swear that no conversation took place about the suit while the jury were at the plaintiff's house, and (as is stated in the affidavits of the two jurors), that the Deputy Sheriff and the jury occupied a room by themselves, apart from the plaintiff's family. The act complained of was the act of the Deputy Sheriff—the officer of the Court—and not of the plaintiff; and though it would have been more prudent for him not to have gone to the plaintiff's house, if the jury could have been conveniently accommodated elsewhere, (of which we have no evidence, and no application was made for time to answer that part of the affidavits), we think there is no suspicion of any improper motive on the part of either the officer, the plaintiff, or the jury. Indeed the Deputy Sheriff seems to have considered it his duty to remain with the jury and not allow them to separate, in order to prevent any improper communication with them. In Morris v. Vivian (10 M. & W., 137), where two of the jury, during the progress of a trial that lasted two days, dined and slept at the house of the defendant on the evening of the first day, it was held that this did not avoid a verdict found for the defendant. Lord

Abbiger, C. B., said: "If the Judge who tried the cause had thought "the verdict had been contrary to the weight of evidence—a circum-"stance which would have induced us to look for some motive for "it—or if any corrupt motive could at once be seen, we might have "been induced to set it aside." If the verdict in the case now before us had been contrary to the weight of evidence, or if the evidence in favor of either party had been so nearly balanced, that the jury, in giving their verdict, might be supposed to have been influenced by what took place at the plaintiff's house, that might have been a reason why we should exercise our discretion and set aside the verdict, as the policy of the Court is to avoid any suspicion of improper motives in the jury; but here, it is not objected that the verdict is not fully warranted by the evidence, and as all improper interference on the part of the plaintiff is negatived, we cannot see that the defendant has been in any way prejudiced by what took place, or that under the peculiar circumstances of this case, the due administration of justice requires our interference: we, therefore, think the rule must be discharged.

Rule discharged.

GOURLEY and others v. GILBERT and others.

(Equity Appeal.)

A testator devised as follows:—"Also I give to my son S. H. G. the use of my farm, (describing it), also to his lawful children, and in case of his death without children, then to be equally divided between my five daughters, (naming them) and their heirs forever." When the testator died S. H. G. had no child born; but his wife was then *enciente*, and a son was born shortly afterwards. S. H. G. at his death left this son and four younger children surviving him.

Held—that S. H. G. by this devise took an estate for life, and at his death, all his children then living, an estate in fee.

This was an appeal from a decision of his Honor the Master of the Rolls. The late Thomas Gilbert, by his last will, dated 18th November, 1854, *inter alia*, devised as follows: "Also, I give to my son, "Samuel Henry Gilbert, the use of my farm, called Grimross Island, "containing two hundred acres, situate in the Parish of Gagetown, "County and Province aforesaid, also to his lawful children, and in "case of his death without children, then to be equally divided "between my five daughters, Hannah Bradford, Eliza Amelia, Frances "Elizabeth, Anne Townsend, and Lucretia Sophia Gilbert, and their "heirs forever."

Thomas Gilbert died on the 13th February, 1855. Samuel H.

Gilbert, though married, had no children born at the date of the will, or at the time of Thomas Gilbert's death; but his wife was then *enciente*, and a son, Thomas Gilbert, was born on the 26th June, 1855. S. H. Gilbert died on the 15th April, 1864, leaving his son Thomas and four other children him surviving.

By indenture, dated 29th April, 1861, made between Samuel H. Gilbert and wife, of the one part, and his sisters, Eliza, Frances, Lucretia, and Anne, Samuel H. Gilbert conveyed Grimross Island to his said sisters, in trust, to manage the same, and apply the rents and profits for the payments of all costs, charges and expenses of the trust, and of all moneys then or thereafter owing to them, and to apply the surplus in payment of certain debts due to other parties, including a debt due to the plaintiff, Robert Gourley, and on payment of such debts, to re-assign the same to Samuel H. Gilbert, under which trust deed the grantees entered into possession.

The Master of the Rolls decided that Samuel H. Gilbert and his son Thomas, were under the said devise, on the death of the testator, seised in fee as tenants in common of the said farm. From this decision, the plaintiff Gourley, and the trustees, and the four younger children of Samuel H. Gilbert, appealed. The appeal was argued in Michaelmas Term last.

G. Gilbert (for the children) contended that the true construction of the will was, that S. H. Gilbert should have a life estate and his children a fee simple on the death of their father; remainder to the daughters if he had died without children. It could not be said that the testator intended to give an estate tail, for no such estate can be created in this Province—citing Doe *v.* Barnsall (6 T. R. 30), Doe *v.* Elbey (4 East 313), Jeffrey *v.* Honeywood (4 Madd. 398), Wood *v.* Barron (1 East. 259), Seale *v.* Barter (2 B. & P. 485), Crawford *v.* Trotter (4 Madd. 361), Newman *v.* Nightingale (1 Cox. 341), Slater *v.* Dangerfield (15 M. & W. 263).

Kaye (for the trustees) contended that S. H. Gilbert, by the will, took an estate in fee, with an executory devise to the daughters, in case he died without children—citing Mellish *v.* Mellish (2 B. & C. 520), Doe *v.* Davies (4 B. & Ad. 43), Doe *v.* Bradley (16 East, 399), Hodges *v.* Middleton (Doug. 431), Kith *v.* Ward (2 Sim. & Stu. 409).

Jack, Q. C., (for Gourley) contended that S. H. Gilbert took an estate in fee simple by the devise, which was drawn in such a way as to give an estate tail; but as that estate could not exist in this Province, it gave him a fee simple under our law. Where land is

given to a man and his children, it is the same as if to him and the heirs of his body, and is an estate tail—citing Beresford's Case (7 Rep. 41 a.), Doe *v.* Clarke (2 H. Blac. 399), Millar *v.* Turner (1 Ves. Sr. 85).

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court, (after stating the facts). It was contended, on behalf of the children, that their father, S. H. Gilbert, was entitled to an estate for life only, with remainder over to all his children in fee simple as tenants in common, with a contingent remainder to the testator's daughters in fee, in the event of S. H. Gilbert dying without lawful children. On behalf of Gourley and the trustees, it was contended that S. H. Gilbert took an estate in fee simple, with an executory devise over to the five daughters of the testator, in the event of S. H. Gilbert not having issue at the time of his decease.

In construing an instrument we must bear clearly in mind the established rules of construction, and accurately understand the legal meaning of the terms used; and certainly the primary duty of a court of construction in the interpretation of wills, is, if possible, to arrive at, and give effect to the intentions of the testator, and in so doing to give effect to every word of the will; provided that an effect can be given to every word not inconsistent with the general intent of the whole taken together, and to give to each word employed, if it can with propriety bear it, the literal ordinary meaning which it has in the vocabulary of ordinary life, and not to give to words employed in that vocabulary an artificial, a secondary and a technical meaning; and always to interpret the words used according to their legal effect and operation, unless a different sense must of necessity be put upon some of the words, in order to render the whole will consistent. See Young *v.* Robertson (4 Macq. H. L. C. 314 & 345).

It is much to be regretted that the testator's intent had not been more clearly expressed; but as was said by Lord Eldon in Booth *v.* Blundall (1 Meriv. 337), "the question is not what the testator really "meant (which can never be ascertained) but what he has authorized "the Court to say it is probable was his meaning."

The words are:—"I give to my son, S. H. G., the use of my farm, "(describing it), also to his lawful children; and in case of his death, "without children, *then* to be equally divided between my five daugh-"ters, (naming them), and their heirs forever." "To my son, S. H. G., "the use of my farm." Here we have a plain, intelligible, unambiguous devise, clearly meaning, unless controlled by subsequent language, the beneficial occupation and enjoyment, or receipt of the

rents and profits of the whole farm. It must be remembered that at the date of the will, S. H. G. had no child born. The testator must, we may reasonably suppose, have contemplated that when his will would take effect, the children of his son, if any, would be infants of tender age. In Early v. Beubon (2 Coll. 363, s. c., 10 Jur. 170), V. C. Knight Bruce says: "Both reason and authority, I apprehend, "support the proposition that the defendants are entitled to ask the "Court to read and consider the whole of the instrument in which "the clause stands, and in reading and construing it, to bear in mind "the state and condition in which the testator knew his family to be "when he made the codicil; and if the result of so reading and con-"sidering the whole document with that recollection, is to convince "the Court from its context, that the testator intended to use the "words in their ordinary and popular sense, and not in their legal "and technical sense, as distinguishable from their ordinary and "popular sense, to give effect to that conviction by declaring accord-"ingly."

The practical difficulty in the case before us, of the father and his infant children using the farm jointly, raises of itself a strong presumption opposed to the idea of a tenancy in fee, in common to the father and any individual child or children, who might happen to be *in esse* at his death. Had the testator intended the farm to be used jointly, or in common by the father and children, we think he would have inserted some expression intimating a joint occupation, or made some provision for securing the infant's share of the rents and profits. The least that might have been expected would have been to say—"I give to my son Samuel H. Gilbert and his children, the use of my "farm," &c. But instead of this, the first portion of the devise is wholly unqualified—"To my son Samuel H. Gilbert, the use of my "farm," &c. The testator then commences—not a new paragraph, because he had not completed the final disposition of that particular property—but a new sentence (in which, treating of the same subject matter, he negatives any intention of devising a fee to his son, which the first sentence of the devise, had it there ended, would have conveyed), with the word "also," a word, it may be remarked, with which he commences each and every of the separate paragraphs of his Will relating to separate and distinct properties, and which in this connection, as in other parts of the Will, should have its legitimate meaning; namely, "likewise," "in like manner," "to his lawful children;" but not necessarily at the same time with their father, for the simple reason that both could not enjoy the full use of the farm at the same time. That is, as we read the Will, having given Samuel H. Gilbert a life estate by the words used, he does not intend to cut that down, or interfere with his use of the farm, but to dispose

of it when its use by S. H. G. has terminated, namely, at his death; and therefore the testator goes on to say—"and in case of his death without children, then to be equally divided between my five daughters;" the necessary intendment being, that if there were children of his son then to take, the devise to the daughters failed: shewing that under no circumstances was Samuel H. Gilbert to have a fee; but failing children to take on his death, the property was to go to the female branch of the testator's family.

It can scarcely be disputed that the words of the testator, taken in their natural, ordinary meaning, in the vocabulary of ordinary life, indicate that *all* the children of S. H. Gilbert living at his death were to be benefitted by the devise; and that it was only on failure of such children the property was to go to the daughters; and that the death of S. H. G. was the time contemplated by the testator as the period of distribution; The gift to the children and the contingency are coupled: "also to his lawful children; and in case of his death without children, then," &c., shewing very satisfactorily that the testator intended, not that the children *in esse* at the time of his death should take an immediate estate in possession, to the diminution of the father's interest, and to the exclusion of other children who might be born and living at S. H. G.'s death; but fixing a future time, viz: the death of S. H. G. as the period when his children, then living, should take. In the words of Buller, J., in Doe *v.* Clarke (2 H. Bla. 401), that the bequest is not confined to children living at the death of the testator, but is kept open till the death of his brother—in this case his "son." Then naturally follows the contingency—in case of S. H. G.'s death without children, *then* to be equally divided among the daughters. This is the only construction by which, it appears to us, effect can be given to all the words of the Will, and to the intent of the testator, so far as it can be fairly gathered from the words of the Will, taken in their ordinary sense; and we think no argument can be safely drawn from any supposed knowledge the testator had of the technical language which should be used to create a life estate or an estate in fee; for we find throughout the Will, that he has in several cases used technical language to convey his intentions, and in others he has omitted to do so, where the same intention is apparent.

Reading the terms of this devise in their ordinary signification, three things seem to be reasonably apparent. 1. That the testator did not intend S. H. G. to have an estate in fee, either in the whole, or in any undivided portion of the property. 2. That he intended S. H. G. should have the full enjoyment and use of the property devised during his life; and 3. That he did not intend to confine the ultimate use or benefit of the devise, or any part thereof, to any

one child of S. H. G. to the exclusion of all the other children; but that, on the contrary, he exhibits a desire to make provision for S. H. G. during his life, and for all the children of S. H. G. living at the time of his death; or, in the words of Eyre, C. J., in Doe. v. Clarke (2 H. Bla. 400), "the testator meant, that all the children whom his son should leave behind him, should be benefitted." And lastly, in the event of S. H. G. leaving no children, the property should go to the testator's daughters in fee.

This construction gives the use of the farm to S. H. G., and on his death leaving children, to such children; but, on his death without children, to the testator's daughters; and we think such construction should prevail, unless there are any principles of law, such as the rule in Shelley's case, which would prevent the words used from legally operating in this way, in preference to a construction which not only requires the interpolation of conjunctive words, but actually rejects express and clear words in the devise, and negative inferences fairly deducible from the language used; as instead of giving S. H. G. the use of the farm, as the express words of the devise say he shall have, it gives him the use of but half the farm, and also gives him an estate in fee, in that, when the clear inference is that only a life estate was intended. It also gives a fee in half the property to one child of S. H. G. to the exclusion of all the others, in direct contradiction to the express terms of the Will, and vests the property in such child in possession on the testator's death, in opposition to the fair inference that the children's interest was not to vest in possession till the death of their father.

Assuming then that we have, with a reasonable degree of certainty, ascertained the testator's intent, we have next to consider whether there are any legal obstacles to prevent the words used from operating as the testator appears to have contemplated they should. This will, in the first place, depend on the effect to be given to the term "children." The words "child" or "children" are, in their usual sense, words of purchase, and are always so regarded, unless the testator has clearly used them as descriptive of the estate given, and not to designate the donees. In other words, where it is absolutely necessary to effectuate the testator's intention, these words being naturally words of purchase, may be converted into words of limitation. Wild's Case (6 Co. 16), Buffar v. Bradford (2 Atk. 220), Doe v. Ld. Mulgrave (5 T. R. 323), Lees v. Mosley (1 Y. & Col. 589), Webb v. Byng (39 Eng. R. 242), Earl of Tyrone v. Marquis of Waterford (6 Jur. N. S. 567), Byng v. Byng (8 Jur. N. S. 1135). In like manner the word "heirs," which is clearly a word of limitation, may sometimes mean the same as "child," or "children," where the testator's intent, so to use it, is clear and unequivocal. Again, the word

"children" does not, in its proper signification, extend further than the immediate descendants of the persons named, and consequently, grand-children, or issue generally, are not included in that term, though they may be so extended from necessity if the Will would otherwise be inoperative, or where it clearly appears that the word "children" was used, not in the proper, but in a more extensive sense; thus Sir William Grant, in Radcliffe *v.* Buckley (10 Ves. 196), says: "It was not contended that the description 'children,' ordinarily and "properly speaking, comprehends grand-children. It was decided in "the case referred to, Crook *v.* Brookeing (2 Vern. 106), that if there "were children, grand-children could not take with them a legacy "given to children. The decision of the Lords Commissioners in "that case was approved by Lord Northington in Hussey *v.* Dillon "(Amb. 603), and was not disputed by Lord Hardwicke in Wythe *v.* "Blackman (1 Ves. Sr. 196), and Lord Alvanley's declaration in "Reeves *v.* Brymer (4 Ves. 689), that 'children' may mean grand-"children, where there can be no other construction, but not other-"wise, is consistent with, and founded upon, that case. There are "two cases in which that word has received another construction— "1st, the case of necessity, where the Will would remain inoperative, "until the sense is extended; next, where testator has clearly shewn "by other words that he does not use the word 'children' in the proper "sense, but means it in a more extensive signification. Referable to "the first head is Wyld's Case (6 Rep. 16), where, upon a devise to a "man and his children, it was held, that if there were no children at "the time, the father would take an estate tail, and children would "mean issue, for it was evident something was intended for children; "but none being *in esse*, they could take nothing except through the "father, and he could transmit to them nothing unless he had an "estate of inheritance. It was necessary, therefore, to construe the "word 'children' issue, on account of the general apparent intention. "The other case of exception is where the testator has indifferently "used the words 'issue' and 'children,' shewing he meant to use the "word 'children' in the same sense as 'issue;' as in Wythe *v.* Black-"man, Gale *v.* Bennet (Amb. 681), and Royle *v.* Hamilton (4 Ves. "437). It was not in any of these cases determined that by a mere "bequest to 'children,' grand-children are to be let in, but it was "clearly shown that he meant 'issue.'"

By fiction or indulgence of the law, an unborn child *en ventre sa mere*, is treated as actually born, for the purpose of enabling such child to take a benefit which, if born, it would be entitled to; (Doe *v.* Clarke 2 H. Bla. 399; Blasson *v.* Blasson, 10 Jur. N. S. 1113), therefore in this case, as there was a child which must be considered *in esse* at the death of the testator, the necessity which existed, in

Wyld's Case, for construing the word "children" as a word of limitation, does not here arise. We are, notwithstanding, asked to treat it as a word of limitation, and so construe the devise as a gift to S. H. Gilbert in tail, which estate was abolished by the Revised Statute, cap. 115, (which declares that every estate which would hitherto have been adjudged a fee tail, shall hereafter be adjudged a fee simple); and that, therefore, by virtue of the Statute and the rule in Shelley's case, S. H. Gibert took an estate in fee. But what is there in this case that should induce us to construe the word "children" out of its ordinary meaning, and treat it as a word of limitation? To do so, if we have arrived at an accurate understanding of the testator's intent, would be to act on principles directly contrary to those we have already enumerated as binding on us, and instead of using the words in their natural signification to effectuate the intention of the testator, we should be employing them to frustrate his manifest and clearly expressed intent, that the children of S. H. Gilbert should have the use of the farm. It is laid down in Cruise's Dig. Title 38, "Devise" ch. 14, § 33, that the rule in Shelley's case does not apply to the word "sons" or "children," therefore he says, "a devise to A for life with remainder to his first and other sons, or "to his sons and children, gives to A only an estate for life, and his "sons or children will take by purchase." See also Fuller v. Chamier, 12 Jur. N. S. 642. He illustrates it by these cases, (§ 36), "A will was made in these words, 'my will is that my son shall have and "enjoy the manor of B. only for his life, and then the premises shall "descend and come to his male children, if he have any, for their "natural lives only, and to the male children descending from them.' "It was resolved that the son took an estate for life only." Goodlittle v. Woodhall, [Willes 592]. Again, a person devises a house to his son for life, and after his death unto all and every his children equally, and to their heirs; and in case he died without issue, he gave the premises to his daughters. Goodright v. Dunham, Doug. 264; Rex. v. Stafford, 7 East 521. It was admitted that the son took an estate for life only. And he says, in Title Deed, c. 23, § 28, "One of the principal reasons for establishing this rule, was to pre-"vent the abeyance, or suspension of the inheritance. It is only "applied to those limitations in which the word 'heirs' is used, on "account of the maxim that *nemo est hæres viventis*. So that if "lands are limited to A for life, remainder to his first and other sons "and the heirs of their bodies; or remaider to the 'child' or 'children' "of A, or to the 'issue' of A and the heirs of his or their bodies, no "more than an estate for life; will vest in A, and the words 'son,' "'child,' or 'issue,' will be construed words of purchase, and give a "vested remainder."

We have lastly to consider whether the remainder vested absolutely in the son, *in esse* at the time of the death of the testator, to the exclusion of the children subsequently born. No doubt when a bequest is to children of a class, children in existence at the death of the testator, including a child *in ventre sa mere*, are alone entitled. But children born after the testator's death may be entitled, in cases where the distribution is deferred until a particular period after his decease: therefore it has been held, that a gift to A for life, remainder to his children, includes all children, both those born before, and those born after the testator's death; for although an interest in the subject of bequest be immediately given, yet if the vesting in possession be postponed, all will take who answer the description, not at the death of the testator, but those born afterwards at any time before the particular estate ends, and the property is to vest in possession—the gift will open to let them in, and the first vested interest will be divested in quantity by the birth of the subsequent children, who each take a vested interest as they come *in esse*. In Leake v. Robinson, (2 Meriv. 382), Sir Wm. Grant says, that a bequest to a parent, for life, with remainder to his children, includes all children, both those born before and those born after the testator's death; that the rule of construction is completely settled, and that whenever a testator gives in that manner, he means to include all children such parent may at any time have. That it is not an artificial rule. It is the rule which excludes any of the children which is so.

Baldwin v. Karver, (Cowp. 309), is directly to the same point.—Aston, J., says: "The material consideration in all the cases has been "the time when, or the contingency upon which the devisees are to "take; and beyond that time, none have been let in." Heath v. Heath, 2 Atk. 121; Warren v. Johnson, 2 Cha. R. 69; Ellison v. Airey, 1 Ves. Sr. 114. "Where there is a devise to the *children* of "A, who has only *one* child born at the time of the will, all the chil-"dren born after may be let in." Bateman v. Roach, 9 Mod. 134. Lord Mansfield says, in the same case:—"The doctrine is very well "laid down in Ellison v. Airey, 1 Ves. 114. Where one devises to "children, if it be an immediate devise, then it shall only be intended "to relate to children *in esse* at the time. * * But if in a will, "a devise is limited to *children* by way of remainder, or upon a con-"tingency which, in the contemplation of the testator, is uncertain "*when* it may take place, if it ever happens at all; there the same "reason holds why it should not be confined to those only who were "alive at the time of making the will. Here the devise is a remainder "after two estates tail; therefore we are clearly of opinion that *all* "the grand-children *in esse* at the time when the devise vested, were "equally entitled to take."

The result of our judgment, therefore, is: that Samuel H. Gilbert took an estate for life, and as we are clearly of opinion that the distribution among the children was not to take place till his death, all his children then living took an estate in fee, a devise of the estate without words of limitation passing the fee simple, unless a contrary intention appear. (1 Rev. Stat, 280). Here the intention of the testator is manifest; because, in the event of his son, Samuel H. Gilbert, dying without children, the daughters of the testator were to take the estate equally in fee; but in the event of his leaving children, the daughters were to take nothing; shewing that while the testator devised to his son but an estate for life, the children of his son were to take the same estate the testator's daughters would have taken on failure of children; a final disposition of the property being evidently contemplated.

The case is by no means free from difficulties. In deference to the opinion of the Master of the Rolls, whose judgments are always entitled to the greatest respect, and in justice to all the parties, we have given the question the greatest consideration. We have sought to discover the testator's intent, solely from the words of the Will, without speculation or conjecture. It may be that our construction of these words is not that intended by the testator; if such should be the case, we may regret it, but cannot help it—as the Will is, so must we construe it. We have, however, this satisfaction, that by the construction at which we have arrived, the property is distributed equally among those who had a legitimate claim upon the testator's bounty, and whom he obviously had some intention of benefiting; and, as said in Broom's Maxims (3d ed.) 377: "Where the "the context is doubtful, the Court, so far as it can, will prefer that "construction which will most benefit the testator's family generally, "on the supposition that such a construction must most nearly cor-"respond with his intention." Citing Farrant v. Nichols (9 Beav. "329); Slater v. Dangerfield (15 M. & W. 263).

The decree of the Master of the Rolls must be reversed.

HODGE v. REID.

Where an issue is sent down for trial by the Equity side of the Court, under 17 Vict. cap. 18, § 18 (2 R. S., p. 80), a motion for a new trial must be made before a Judge in Equity.

S. R. Thomson, Q. C., on a former day in this term, moved for a new trial, in the usual manner of motions for new trials, at common

law. The trial had been had at the last York Sittings, upon a feigned issue, sent down from the Equity side of the Court, to determine what was due, if anything, upon a certain contract, the subject of a suit in Equity. He contended that the words of the clause of the Act (17 Vict., cap. 18, § 18, Rev. Stat. 80), "Subject to a new trial in the ordinary manner, in the Supreme Court," meant that the motion should be made on the common law side of the Court.

Cur. adv. vult.

Per Curiam.—The wording of the section is somewhat ambiguous, but it must be construed with reference to the whole Act, and it cannot be presumed that the Legislature intended to overturn entirely the system of procedure in Equity, which has prevailed heretofore. This motion should have been made before a Judge of the Court which ordered the issue to be tried.

Motion dismissed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NEW BRUNSWICK,

IN TRINITY TERM,

IN THE THIRTIETH YEAR OF THE REIGN OF QUEEN VICTORIA.

TURNER *v.* KEIVER.

JUNE 15th.

Defendant agreed to deliver plaintiff 100 tons of timber, of a specified size and quality, at a certain time. He delivered 101 tons, partly within the time, but not of the size or quality required. Disputes having arisen respecting it, and also as to the defendant's liability to pay the expenses of putting the timber in shipping order, it was agreed between them that if the defendant would pay this expense, the plaintiff would allow the timber at 89 tons at the contract price. In an action for non-delivery of the timber, it was left to the jury, whether the plaintiff had agreed to receive the timber, and waive all claim for damages for breach of the contract; and the jury having found in the affirmative;

Held—no misdirection—and that the performance of the contract being in controversy between the parties, such a settlement was binding—the defendant's agreement to pay for trimming the timber, being a sufficient consideration for the plaintiff's promise.

***Semble*, that what took place between the parties, might be treated as an accord and satisfaction of the plaintiff's demand.**

Assumpsit tried before ALLEN, J., at the last Albert Circuit, on an agreement dated 19th December, 1863, whereby defendant agreed to deliver to the plaintiff one hundred tons of merchantable hardwood timber, of not less than sixteen inches average; none of it to be less than fourteen inches, to be delivered on or before the 1st June then

next, at Turner's wharf, in Harvey; the plaintiff to pay $3.50 per ton for sixteen inches average, and $4 per ton for timber averaging seventeen inches. Breach that defendant did not deliver the timber, and that plaintiff having chartered a vessal to carry the timber, had to pay a large sum for demurrage. Plea non-assumpsit.

At the trial, it was contended on the part of the plaintiff, that he had not received all the timber agreed for; that the timber he did receive was not of the size or quality specified in the contract; and that half of it was the property of one Crandall. The timber was not delivered before the 1st June, and a portion of it was unsound and undersized.

Evidence was given on the part of defendant, that the whole of the timber belonged to him at the time of its being delivered to plaintiff; that a settlement took place between him and the plaintiff in August, 1864, in consequence of a dispute about the quantity and quality of the timber, and a claim made by the plaitiff to deduct a certain sum, for the expenses of trimming the timber to make it fit for shipping. At this settlement it was agreed, that the plaintiff should allow for eighty-nine tons two feet of timber at $3.50 per ton, and that the defendant should pay the expenses of trimming. A written memorandum of the arrangement was drawn up at the time, in the following words:—

"Bill of timber purchased from Keiver and Crandall, one hundred "and one tons eighteen feet, from survey bill; less refuse, twelve "tons sixteen feet, eighty-nine tons two feet." (The amount deducted for trimming, and a sum allowed defendant for the refuse timber, were then stated, and a balance was struck in these words):

"Amount in full to Keiver and Crandall,	$286.68
"Half to credit of Crandall,	$143.34
"Do. do. Keiver,	$143.34

Crandall was not a party to this settlement, and the defendant denied all knowledge of the memorandum being made out in the joint names of himself and Crandall. He said he had no copy of it; that it was not read to him at the time, and that he requested the person who wrote it, to divide the eighty-nine tons two feet, in order that he (defendant) might settle with Crandall.

The learned Judge left the following questions to the jury:—

1. Did the defendant perform his contract for the delivery of the one hundred tons of timber?

2. If he did not perform his contract, did the plaintiff agree by the settlement to accept the timber at the contract price, and did he receive it, and waive all claim for damages, for non-delivery according to the contract?

3. Was half the timber delivered the property of Crandall? If it was, the defendant was only entitled to be allowed for half the quantity received by the plaintiff.

The jury found a verdict for defendant, stating that all matters in dispute were settled by the arrangement made between the parties.

Palmer, Q. C., in Michaelmas Term last, obtained a rule *nisi* for a new trial, on the grounds: 1. Misdirection in telling the jury that after breach of the contract the damages could be waived, or that plaintiff could, by accepting timber varying from the contract, waive all damages, unless there was a new consideration. 2. Verdict against the weight of evidence.

Steadman shewed cause in Hilary Term, contending that it was a proper question to leave to the jury, whether there was an agreement on the plaintiff's part, to take the timber at the price named and waive all claim to damages; and that the payment of the trimming bill by defendant, which was in dispute, was a consideration for such waiver. The weight of evidence was in favor of there having been such a settlement, as was spoken of by defendant.

Palmer, Q. C., contra, contended that the contract, not having been fulfilled by the defendant, he could only get rid of his liability after breach, by release or accord and satisfaction. There was no pretence of the former in this case, and no accord and satisfaction. Waiver could only discharge the contract before breach. The verdict was against the weight of evidence, which clearly showed that one half the timber belonged to Crandall.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgement of the Court.

This was an action of assumpsit on an agreement dated 19th Dec., 1863, whereby defendant agreed to deliver plaintiff one hundred tons merchantable hardwood timber not less than sixteen inches average, and none less than fourteen inches; timber to be delivered at the bank, at high water mark, on or before 1st June then next, plaintiff to pay $3.50 per ton for 16-inch average, and $4.00 for 17-inch

average; the timber to be delivered near the bank at Turner's wharf in Harvey. Breach, that defendant did not deliver any of the timber; that the plaintiff had chartered a vessel to convey the timber, and had to pay a large sum for demurrage. Plea non-assumpsit.

The plaintiff's contention was, that he did not receive all the timber; that what he did receive was not in accordance with the contract, and that half of it was the property of Crandall, and not defendant's.

The defendant and Crandall both proved that the whole of the timber was the defendant's at the time it was delivered to, and received by, the plaintiff. The defendant alleged a settlement between himself and the plaintiff after the delivery of the timber, at which there was a dispute, as to the quality, quantity, and size of, and the amount charged for trimming the timber, which he says was finally settled by plaintiff's proposing to him, that if he (defendant) would pay the trimming bill, he would allow the timber to go at the eighty-nine tons (one hundred and one tons having been delivered), at the contract price—16-inch average—which the defendant agreed to, and it was charged in settlement, that this was a settlement on the agreement of all disputes under it, and a balance struck of the amount coming to the defendant. The plaintiff denied any settlement as between him and the defendant; but alleged it to have been between himself, the defendant, and Crandall—the latter of whom, he alleged, owned half the timber.

The learned Judge submitted to the jury:—

1. Did the defendant perform his contract for the delivery of the one hundred tons of timber?

2. If he did not perform the contract, did the plaintiff agree to accept the timber at the contract price, and did he receive it, and waive all claim for damages?

3. Was half the timber delivered the property of Crandall?

If the timber was made under agreement between the defendant and Crandall, that each was to have half, they would be tenants in common, and one could not dispose of more than his own share; and in that case the defendant would only be entitled to credit for half of the quantity delivered.

The jury found a unanimous verdict for defendant, and said they found that everything was settled between the plaintiff and defendant by the arrangement made in August, 1864.

Mr. Palmer moved for a new trial on the ground: 1st, of misdirection: that the Judge was wrong in saying that after breach of the agreement, the jury could find damages waived; that the plaintiff could not waive the damages by accepting timber under the quality,

size and quantity stated in the contract. 2nd, that the verdict was against the weight of evidence.

The evidence of the plaintiff and defendant was no doubt very conflicting; but if the jury believed the defendant and his witnesses, which they must have done to arrive at the conclusion they did, there was ample evidence to enable them to find all the timber to be the property of the defendant, and to warrant them in saying, that the plaintiff and defendant had met together and disputed as to the performance of the contract; not only as to the quantity delivered, its quality and size, but as to the amount the plaintiff charged for trimming the timber. All these matters appear to have been in controversy between them; they came together, and all these disputes under the contract were discussed, and if the defendant's view is correct, (and the jury have found it so), finally settled between them, by the plaintiff admitting, on an adjustment of all disputes under the contract, a certain amonnt to be due the defendant. We know of no principle of law to prevent parties so settling their disputes, nor when so settled to disturb such settlement, This did not amount to any variation of the contract, or any attempted substitution of a new contract for the old, performance was alleged on the one hand and disputed on the other, and the claim for money expended on the contract by plaintiff, disputed by defendant, in which controversy the parties came to a satisfactory arrangement between themselves, whereby, as the jury say, all was settled between the parties.

In Cooper v. Parker, (15 C. B. 828), Martin B. says: "I shall "always be ready to concur in such a judgment, as tends to allow "parties to contract for themselves what engagements they please."

Alderson B. says: "I entirely concur in the soundness of that principle," and certainly if parties should be allowed to contract for themselves, they should not only be allowed, but encouraged, to settle between and for themselves, any disputes arising on such contracts, instead of endeavoring, when they do so settle, to discover and strain some nice technical legal principle, and we had almost said, quibble, whereby such settlement may be destroyed, and a field of litigation opened. Assuming the contract not to have been performed in this case by the defendant, he was clearly entitled to receive from the plaintiff, the value of the timber actually received and retained by the plaintiff, though it is true the plaintiff might have an action for breach of the contract; but if, instead of paying the value of the timber actually received, and bringing an action for non-fulfilment of the contract, disputes arise as to the question of performance either as to the quantity, quality or size of the timber or other matters connected with the contract, what is to prevent the parties settling between themselves these differences, by fixing the amount the vendor

is to receive, and the vendee to pay under the contract? And if they do settle, must it not be presumed that if the contract was not literally performed, the parties took all matters as affecting their interests respectively into consideration? The vendee may not have been actually damnified by the breach; or if he was, in agreeing to take the timber of the quantity, quality and size, and at the price agreed on, must it not be presumed (because there could be no settlement otherwise such as the jury found) that these damages were fully considered by the vendee; and for which he received an equivalent, in the general benefit he derived from the settlement of the disputed items; or that he waived them, in consideration of defendant's assenting to the settlement of all matters on the terms agreed? On the same principle that though the acceptance of a smaller amount is not a satisfaction of a larger amount, yet when there are disputes, or the amount is unliquidated, it is so. We think it must be taken that the jury found this to be the case: in other words, that the settlement was of all matters in dispute between the parties under the contract. It is quite obvious that under the evidence in this case, no special damage arose from the amount of the difference between the eighty-nine and the one hundred tons; and apart from the settlement, the substantial contention in fact was, as to the defendant's right to the whole of the timber; which the jury, under the learned Judge's charge, have clearly found in his favor.

Admitting, however, that what took place between the parties amounted to the substitution of a new contract, we think there was a sufficient consideration for the plaintiff's agreement to accept the timber at the contract price,, and to waive his claim for damages for non-delivery on the 1st of June. There was a dispute between them about the quality of the timber and the expenses of trimming. The defendant swears, that after the timber was brought down, and before the alleged settlement, the plaintiff proposed to him, "that if "he (defendant) would pay the trimming bill, the plaintiff would "allow the timber to go at the eighty-nine tons at the contract price, "sixteen inch average"; to which proposal the defendant says he assented, and that the expense of trimming the timber, £5 14s., was charged to him in the settlement which afterwards took place. This was either a benefit to the plaintiff, or at all events some trouble to, or charge upon the defendant, and therefore a sufficient consideration to sustain the plaintiff's agreement.

In Flockton v. Hall (14 Q. B., 387), Erle J. says: "I take the law "to be, that an agreement may be accepted in satisfaction of an exist-"ing cause of action." Here there was not only an agreement, but an actual performance of the agreement, which the jury have virtually found was accepted in satisfaction of the cause of action,

which the plaintiff had for non-performance of the agreement. May it not be treated as an accord and satisfaction? The plaintiff had a claim against the defendant for unliquidated damages for non-delivery of the timber at the time agreed upon, which claim they had a right to settle on any terms they pleased. They agreed that on payment, by the defendant, of a certain sum claimed by the plaintiff for expenses on the timber, he would receive a certain portion of the timber at the contract price, though it was in fact inferior in size and quality, to that which the defendant had agreed to deliver. The defendant paid this claim and the plaintiff received the timber. The jury have found that this was a settlement of all transactions between the parties, and though the evidence certainly tended to show that only half the timber belonged to the defendant, there was evidence enough to justify the jury in finding as they have.

Under all these circumstances we should be exercising a very unsound discretion in prolonging litigation.

Rule discharged.

ABELL *v.* LIGHT.

JUNE 15th.

A married woman, whose husband is insane and confined in a Lunatic Asylum, and who is compelled to support herself by keeping a boarding house, may sue and recover in her own name, the amount due from a boarder lodging in the house after her husband's insanity, under the Rev. Stat., c. 114, § 3.

The amount due from a boarder under such circumstances, vests in the woman as her separate property, and will not pass to the husband's representatives on his death.

A declaration alleging that the plaintiff was a married woman, living separate and apart from her husband, and compelled to support herself, and that the defendant contracted with her while she was such married woman and compelled to support herself, sufficiently shows the plaintiff's right to sue in her own name under the act.

Assumpsit for board and lodging and the use of rooms. The declaration contained six counts. The first, second and third counts alleged that at the time of making the contract, the plaintiff was a married woman living separate and apart from her husband, and compelled to support herself. The remaining counts were in the usual form, without any reference to the plaintiff's position. Plea, non-assumpsit.

At the trial before RITCHIE, C. J., at the St. John Circuit in January last, it appeared that at the time the alleged cause of action arose, the plaintiff was a married woman living separate and apart from her husband, who had lost his reason, and was an inmate of

the Provincial Lunatic Asylum. He had been a seafaring man, and previously to his becoming insane, plaintiff had keept a boarding house under his direction, and she continued the same occupation after his removal to the Asylum, and up to the time of his death, which happened before the present action was brought. The husband left no property, and the plaintiff had no means of supporting herself and her children but by keeping a boarding house. The defendant's contract for board was made with the plaintiff personally, and payments from time to time were made with her, without any reference to her husband, who, during the whole time, was insane, and confined in the Asylum.

It was contended at the trial, on behalf of the defendant, that the fact of the plaintiff's husband becoming a lunatic, and being sent to the Asylum, was not such a desertion or abandonment as would bring her within the terms of the Act, (1 Rev. Stat., p. 294, c. 114), and that therefore she could not maintain the action. The point was reserved and the jury, under the learned Judge's direction, found a verdict for the plaintiff.

Jack, Q. C., in Hilary term last, obtained a rule *nisi* for a new trial on the grounds: 1st, of misdirection on the point reserved; 2nd, that the declaration was defective and did not show on its face any right to recover. Caudell *v.* Shaw (4 T. R.. 361), Bidgood *v.* Way (2 Wm. Black, 1237), Beard *v.* Webb (2 B. & P., 93), Marshall *v.* Rutton (8 T. R., 545), Lewis *v.* Lee (3 B. & C., 291), Boggett *v.* Friar (11 East, 301), were cited.

D. S. Kerr, Q. C., shewed cause in Easter Term last. The case rests on the third section of the Act (1 R. S., c. 114), which vests in a married woman deserted by her husband, or compelled to support herself, any property she may acquire. This is just such a case as the Act contemplates. The husband, instead of contributing to her support, as by the marriage contract he should, loses his reason and becomes incapable of providing for her. The marriage contract entitles the husband to all the wife's personal property, and choses in action when he reduces them into possession, thus suspending her right to sue in her own name, and he contracts to support her while he lives. As soon as that part of the contract which relates to her maintenance ceases to be operative, the law allows her to sue in her own name. In cases of lunacy the law will assume an authority where there is none in point of fact. Here the defendant contracts solely with the plaintiff, without reference to the husband, who was dead when the action was brought; she being the meritorious cause of action, it survives to her. Brashford *v.* Buckingham (Cro. Jac.

77, 205); Fountian v. Smith (2 Sid. 128); Philliskirk v. Pluckwell (2 M. & S. 397); Gates v. Madley (6 M. & W. 423); Richards v. Richards (2 B. & Ad. 447); Wills v. Nurse (1 A. & E. 65); Nash v. Nash (1 Mad. 133). The defendant having dealt with her as competent to contract, he cannot now deny his liability. Dalton v. Midland County Railway Co. (13 Com. B. 473); Scarpellini v. Atcheson (7 Q. B. 864). There is no evidence of any of the goods in the possession of the plaintiff ever having belonged to her husband. If he had been living he could not have brought an action on the contract, without her being joined. Ness v. Angas (3 Ex. 805); Ness v. Armstrong (4 Ex. 21). Where the contract is made by the wife, coverture can only be pleaded in abatement, and not in bar. Bendix v. Wakeman (12 M. & W. 97). A chose in action may accrue to the wife, and if the husband does not reduce it into possession, it survives to her quite independently of the statute.

Jack, Q. C., and *Palmer*, Q. C., contra. The furniture in the house, by means of which she was enabled to keep boarders, belonged to the husband, and his being in the asylum did not vary the ownership. He was entitled to the services of his wife, and the ownership of the furniture makes the proceeds of its use belong to him. [WILMOT, J.: It only became profitable from her labor, as in the case of a sewing machine. RITCHIE, C. J.: The case may be carried farther. Suppose the husband to leave her a dress which she wears, he afterwards goes away, and she goes out to service, wearing this dress, for she could not go naked, would she not be entitled to the wages of her service?] It cannot be denied that there is a combination of the husband's property and the wife's services, and that the husband is entitled to both. The second section of the Act (1 Rev. Stat. cap. 114), will not cover this case, for the husband cannot be said to have deserted or abandoned the plaintiff. In the third section the word property means tangible property, such as goods, and not mere choses in action. [ALLEN, J.: The conclusion from your argument would seem to be, that if a person took the furniture she could bring trespass or trover for it, but if she sold it she could not recover the price.] The third section protects the property, but it requires the second to enable her to bring the action. The cases cited in regard to her common law right to bring the action as survivor, are not in point, for to take advantage of it she must sue as survivor. The declaration here is framed as if the husband were alive; there should have been a distinct allegation that he was dead.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

This was an action of assumpsit, brought to recover an amount claimed to be due for board and lodging, and the use of rooms. At the time the alleged indebtedness was contracted, the plaintiff was a married woman; when the action was commenced she was a *feme sole*—her husband having died after the debt, if any, accrued. The plaintiff's husband was a seafaring man, and while at sea the plaintiff kept a boarding house under his direction. In consequence of misfortunes which befell the husband, he became insane, and was, about the time the defendant commenced boarding with the plaintiff, sent to the Provincial Lunatic Asylum, where he continued, and was supported by that establishment till his death; during all which time the plaintiff was compelled to maintain herself and her children, her husband having no property, and she having no means of support except from her labor in keeping a boarding house. The defendant boarded with her, making his agreements with her from time to time, paying her, and settling with her wholly irrespective of her husband, or any other person, and dealing with her throughout as a *feme sole;* in fact his meritorious defence to this action being, that he had settled with her and paid her in full.

The declaration alleged in the first, second, and third counts, that at the time of making the contract, &c., the plaintiff was a married woman, living separate and apart from her husband, and compelled to support herself. The fourth, fifth, and sixth counts were in the usual form, without any reference to plaintiff's coverture, or being compelled to support herself.

On the trial it was urged that there was no desertion or abandonment by the husband; that the fact of the plaintiff's husband becoming a lunatic, and being sent to the Lunatic Asylum, did not amount to desertion and abandonment, without which plaintiff had no right to maintain the action. The point was reserved, and the case went to the jury simply on the merits, who found for the plaintiff £47 8s. 4d. A new trial was moved for on the ground of misdirection in this: that the Judge was wrong in not directing the jury that the plaintiff had not brought herself within the terms of the Act of Assembly, to enable her to claim and sue in her own right; and that if she had, she could not recover on the declaration in this case.

The Statute under which the plaintiff claims to recover is, 1 Rev. Stat. 294 § 3, and enacts that, "where any married woman, deserted "by her husband, or compelled to support herself, shall acquire any "property, it shall vest in her, and be at her disposal, and not sub-"ject to the debts. interference or control of her husband." This is a remedial statute, enlarging the rights of married women compelled to support themselves, extricating them from the too narrow and circumscribed limits of the common law, and therefore should receive

a liberal construction to effect the obvious intention of the Legislature; and to accomplish which, the word property must be read in the largest signification, as embracing all property real and personal. The debt due by the defendant was a chose in action, and unquestionably personal property. There is certainly no more legitimate way by which a married woman, left destitute, and compelled to support herself, could acquire property than by keeping a boarding house; and if for services rendered by her, a voluntary payment would vest the property in the money received, in her, and place it at her disposal, and not subject to the debts, interference or control of her husband, it is difficult to understand how a party, by witholding payment from a married woman compelled to support herself, could thereby destroy her right to recover it. To place her in such a helpless position would be entirely to frustrate the humane intention of the Legislature, and to place the result of her labor out of her reach; and, if the defendant's contention is correct, vest it in the husband, and subject it to his interference and control, and after his death necessarily vest it in his personal representatives, and consequently subject to his debts; contrary to the whole scope and object the Legislature most clearly had in view. We think the plaintiff has very clearly brought herself within the provisions of the Statute. If the husband had been living, we cannot see how it could be argued that he should necessarily join with the wife, inasmuch as to require this would compel him to interfere, and give him a control which the Statute expressly says he shall not have. This case is entirely different from Dow v. Dibblee, which arose under the first section of the Act, and is not applicable to the present case. We held then that the husband and wife might join in the action; and we do not intend to disturb that decision. It might be fairly argued that the wife should, if the action is brought in the lifetime of the husband, show on the face of her declaration the circumstances necessary to entitle her to sue in her own name; and if such should be the case even after his death, which we by no means decide, what more can be required than we have in this case? The declaration alleges that, "the plaintiff was a married woman, living "separate and apart from her husband, and compelled to support "herself," and that the indebtedness accrued for the board and lodging, and the hire of rooms, "while she was a married woman, and "compelled to support herself." If this language insufficiently shows the plaintiff's right on the face of the declaration, we do not possess ingenuity adequate to suggest language that would. We therefore think there is no ground for disturbing this verdict.

Rule discharged.

WASSON *v.* TAYLOR.

JUNE 15.

Defendant made complaint before a Magistrate that the plaintiff had threatened to shoot him, whereupon a warrant was issued and the plaintiff arrested and brought before the Magistrate, who, after hearing the parties, dismissed the complaint.

Held, in an action for malicious prosecution, that there was a termination of the proceedings before the Magistrate.

This was an action for malicious prosecution, tried before WELDON, J. at the last Sunbury Circuit. The declaration stated that the defendant falsely and maliciously, and without any reasonable or probable cause, made complaint, on oath, before James K. Hazen, one of Her Majesty's Justices of the Peace for Sunbury, that the said plaintiff threatened to shoot him, (defendant), and that the plaintiff at the same time produced a pistol and told defendant that he would lay him dead in an instant, and upon such complaint defendant caused and procured the said Justice to make and grant a warrant, upon which the plaintiff was arrested and taken before the said James K. Hazen and Charles H. Clowes, another Justice of the Peace for the said County, who, having heard and considered the evidence of the defendant, adjudged that plaintiff was not guilty, and caused him to be discharged, dismissing the complaint with costs, by means of which arrest, &c., plaintiff was injured in his means, credit, reputation, &c.

It appeared that the defendant had made a complaint against the plaintiff, under oath, before James K. Hazen, a Justice of the Peace, as stated in the declaration, on which he issued a warrant, and the plaintiff was arrested and brought before Mr. Hazen and Charles H. Clowes, another Justice of the Peace, and that they, after hearing the matter in the presence of both parties, dismissed the complaint. Mr. Hazen was called as a witness by the plaintiff, and produced his book containing a record of the proceedings, and the adjudication of the Justices.

The defendant's counsel moved for a nonsuit, on the ground that no termination of the proceedings had been proved, and the learned Judge being of that opinion, ordered a nonsuit accordingly.

A. R. Wetmore, Q. C., in Hilary Term last obtained a rule *nisi* to set aside the nonsuit.

S. R. Thomson, Q. C., showed cause in Easter Term last, and contended that the proceedings before the magistrates were not shown to be legally terminated. [ALLEN, J.: What more could they do? They investigated the charge and dismissed it]. No record of their

termination was given in evidence, without which no termination could be shown. There was no evidence of malice; the defendant did not ask for the plaintiff's arrest; he merely stated his case to the Justice. Malice being the *gravamen* of the charge, it failed altogether. [RITCHIE, C. J.: It was not a question for the Judge to determine, whether there was malice or not].

A. R. Wetmore, Q. C., contra, contended that the dismissal of the charge by the Justices terminated the proceedings, and that the adjudication was sufficiently proved. Whether the defendant applied to the Justice for a warrant or not, or acted with or without malice, should have been left to the jury.

Cur. adv. vult.

RITCHIE, C. J., now said that there was clear evidence of the termination of the proceedings taken against the plaintiff before the Justice, and therefore the nonsuit must be set aside.

Per Curiam. Rule absolute.

Doe dem. EASTABROOKS *v.* HUMPHEY.

JUNE 15.

Where the verdict is against evidence in an action of ejectment, and the Statute of limitations may defeat the plaintiff before he can bring a second action, the Court will grant a new trial.

This was an action of ejectment tried before ALLEN, J., at the Westmorland Circuit, in July last, in which the jury returned a verdict for the defendant, whose defence to the action was twenty years adverse possession. The facts are sufficiently set forth in the judgment of the Court.

Palmer, Q. C., in Michaelmas Term last, obtained a rule *nisi* for a new trial, on the ground that the verdict was against evidence.

Smith, Q. C., shewed cause in Easter Term; and

Palmer, Q. C., was heard in support of the rule.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

The lessor of the plaintiff proved twenty years possession of the land in dispute, in his father, Thomas Estabrooks, extending back to

about the year 1812; and there is no evidence of any other person being in possession till 1833 or '34, and even that is doubtful. There is no evidence of possession in Knapp till 1836 or '37, and that possession ceased in 1843.

The mortgage from Thos. Estabrooks to Titus Knapp, dated 2nd February, 1819, and the conveyance from Catharine Knapp to Wm. Knapp, dated 10th October, 1834, relating to "dyked marsh," only, clearly exclude the land in dispute; therefore the defendant, claiming under Knapp, has shewn no documentary title, and if he can hold the land, it must be by adverse possession.

We cannot discover any such evidence of a continuous possession for twenty years in the defendant, and those under whom he claims, as will make out a title of adverse possession. There was a break in Knapp's possession during the four years of the widow's occupation of the dyked marsh, and therefore we think the defendant entirely failed to make out any defence to the case established by the plaintiff, and that the verdict ought to be set aside.

In general, new trials are not granted in actions of ejectment, on the ground of the verdict being against evidence, because the plaintiff can bring another action; but as in this case, the statute of limitations may defeat the plaintiff if a new action should be brought, we think a new trial should be granted on payment of costs.

Rule absolute for new trial on payment of costs.

DESBRISAY v. GLENCROSS.

JUNE 22.

Defendant agreed, in writing, to deliver plaintiff a quantity of logs, for which the plaintiff agreed to pay him, after paying the amount of the defendant's account due the plaintiff, at the rate of sixteen shillings per thousand feet.

Held, in an action on this agreement that parol evidence was admissable on the part of the defendant, to show what the account referred to in the agreement was, and to identify an account rendered to him by the plaintiff, as the account so referred to.

This was an action of assumpsit, on an agreement in writing, whereby the defendant, in consideration of having liberty from plaintiff to haul timber from land under license to him, from which defendant had already hauled seven hundred trees, agreed to deliver to plaintiff one hundred and fifty thousand superficial feet of merchantable spruce and pine saw logs, at his boom at Richibucto, as soon after the opening of navigation as practicable; for which plaintiff agreed to pay defendant, after paying the amount of the defend-

ant's account due plaintiff, in cash at the rate of sixteen shillings per thousand feet.

At the trial before WELDON, J., at the last Kent Circuit, the defendant's counsel tendered in evidence an account, which was alleged to be the account referred to in the agreement. In this account a balance was struck in favor of the plaintiff, and it was tendered in order to shew the amount the plaintiff had agreed to allow for logs in payment of that balance. This evidence was rejected, and the jury found a verdict for the plaintiff.

Palmer, Q. C., in Easter Term last, obtained a rule *nisi* for a new trial, on the ground of the improper rejection of this evidence. 2 Taylor on Ev., § 1058, 1082, and 1085 was cited.

D. S. Kerr, Q. C., shewed cause in Easter Term. The rejection of the evidence was clearly right. In some cases parol evidence is admissable to explain the terms of a contract, but only where the contract is open to it, and its terms will warrant. Here the contract is complete in itself, and contains no latent ambiguity; it is not unintelligible to the Court, or susceptible of two or more meanings; nor do the persons or things in it require idendification, so as to bring it within the terms of the rule referred to in Taylor on Ev. § 1058. This agreement is not to be altered by anything in the account, for it is an entirely new contract founded on a new consideration. [RITCHIE, C. J.: How can the account be rejected when it is referred to in the agreement?] The amount of the account might be admissable, but no assumed agreement as to the price of logs, should be admitted to change the plain terms of the contract. The only fair interpretation that can be given to it is, that sixteen shillings per thousand was to be the price of all the logs.

Palmer, Q. C. The agreement by its terms places the payment of the sixteen shillings for the logs, after the payment of the account. Without parol evidence it is impossible to tell what was the amount of the account, which was tendered expressly for the purpose of showing the balance due the plaintiff and the nature of the transaction, and as evidence of the price the plaintiff was to allow for the logs in payment of it. The plaintiff cannot be allowed to fix the amount of the defendant's indebtedness to him, and conceal the manner in which it was to be paid. [RITCHIE, C. J.: Is not the account part of the agreement, and to be read with it?]

Cur. adv. vult.

ALLEN, J., now delivered the judgment of the Court.

We think there must be a new trial in this case. The agreement between the parties, on which the question arises, stated that the defendant, in consideration of the privilege of hauling lumber from grounds under licence to the plaintiff, on Kouchibouguac river, and from which he had already hauled 700 trees, agreed to deliver to the plaintiff, at Richibucto, 150,000 feet of merchantable pine and spruce saw logs as soon after the opening of navigation as practicable, for which the plaintiff agreed to pay him, after paying his account, at the rate of sixteen shillings per thousand, cash, on delivery of the logs.

The defendant tendered in evidence an account, in the handwriting of the plaintiff, which, it was alleged, was the account referred to in the above agreement, on which a balance was struck in favor of the plaintiff, in order to show the price the plaintiff had agreed to allow for logs, in payment of that balance. This evidence was rejected, and a verdict given for the plaintiff.

We think the evidence ought to have been received. Where the persons or things to which a written instrument refers, require to be identified, parol evidence must of necessity be received. Taylor Ev. § 1058; Macdonald *v.* Longbottom, (1 E. & E. 977); Mumford *v.* Gething, (7 Com. B. N. S. 305). It was impossible in this case, without the parol evidence, to know the amount of the account to which the agreement referred. The account was virtually incorporated in the agreement, which was incomplete without it; and therefore the evidence was absolutely necessary to apply the contract to the subject matter to which the parties referred, and to understand their agreement.

Rule absolute.

Ex parte STREET.

Where an assessment is made under the Parish School Act, the Assessor must give notice thereof, in the same manner as in cases of assessment for County rates, under 1 Rev. S. cap. 53, § 12.

W. W. Street, in Easter term last, obtained a rule *nisi* for a *certiorari* to remove an assessment and all proceedings on which it was founded, made under the Parish School Act, (21 Vict., cap. 9). The ground of the application, as set forth in the affidavit of the party, was that no notice of the intention to make the assessment had been given, as required by the Act, and that the party had consequently no opportunity of furnishing the assessors with a statement, on oath, of his property. *Ex parte* Yeates (4 Allen 381), was cited.

J. W. Chandler, Q. C., now shewed cause against the rule.

Per Curiam. The Parish School Act, under which the assessment was made, provides that the assessment shall be made in the same manner as other county and parish rates. The 12th sect. of the Act providing for the collection of such rates, (1 Rev. Stat. 129), requires the assessors to give notice of the assessment, by posting notices up in three of the most public places in the parish, and by publication in a newspaper, if any be printed therein. Neither of these requisites having been complied with in this case, we think the rule must be made absolute for a *certiorari.*

Rule accordingly.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NEW BRUNSWICK,

IN MICHAELMAS TERM.

IN THE THIRTY-FIRST YEAR OF THE REIGN OF QUEEN VICTORIA.

ROSE *v.* BELYEA.

OCTOBER 12.

The right of fishing in a public navigable river belongs to the public, and not to the owners of the lands bounded on the river.

In trespass for cutting a net with which the plaintiff was fishing in a public navigable river, where the defendant claimed an exclusive right to fish, as owner of the adjoining land, the jury gave a verdict for $40.

Held, that the damages were not excessive, though the plaintiff stated the actual damage to the net did not exceed $2.

This was an action of trespass, tried before RITCHIE, C. J., at the last Kingston Circuit. The damage complained of was the tearing of the plaintiff's net by defendant, while the plaintiff was fishing with it in the river St. John, within the ebb and flow of the tide, opposite to the land of the defendant, who claimed the exclusive right of fishing there. The learned Judge directed the jury that there was no exclusive right of fishing in a navigable river; that the right of fishing in a navigable tidal river, was in the public; and that the ownership of the land gave the defendant no right to interfere with a party fishing in the river in front of it. Verdict for the plaintiff $40.

Barker now moved for a rule for a new trial, on the grounds:—1. Misdirection; 2. That the damages were excessive, the actual damage done to the net being, according to plaintiff's own evidence, only $2; and he was not entitled to exemplary damages. Mayne on Dam. 351; Price *v.* Severn (7 Bing. 316).

Per Curiam. The soil of a public navigable river is in the Crown, and the right of fishing belongs to the public. Since Magna Charta the Crown cannot grant the exclusive right of fishing in a public navigable river to a private individual. The claim set up by the defendant, of the exclusive right to fish in front of his own land, entirely failed. Malcolmson *v.* O'Dea (9 Jur. N. S. 1135).

The damages are not excessive. In trespass the jury are not limited to the actual damage done, but have a right to give the plaintiff such an amount as will compensate him for the expense and loss of time which he must necessarily be subject to in being compelled to bring an action. It might be that the plaintiff would have been willing to take two dollars for the damage done to his net, if he could have got it without trouble or expense, but when he was compelled to sue, the jury were not limited to the sum. In Price *v.* Severn, the plaintiff actually received from the defendant the sum which he demanded as compensation for his imprisonment, which Tindall, C. J., said, amounted to accord and satisfaction. To justify us in granting a new trial on this ground, it must appear that the jury have acted on a wrong principle, or have been influenced by improper motives. We cannot say that a verdict for $40, under the circumstances of this case, is excessive.

Rule refused.

VALENTINE *v.* HAZELTON.

OCTOBER 12.

Plaintiff became surety for defendant as administrator in Massachusetts, and joined him in an administration bond to the Judge of Probates. On passing his accounts in the Probate Court, a balance belonging to the estate was found to be in his hands, unaccounted for, whereby the bond was forfeited. Defendant then resigned the office of administrator without paying over the amount due, and the plaintiff was thereupon appointed administrator *de bonis non*.

In an action in this Province for money paid by the plaintiff to the defendant's use,—the plaintiff's claim being a liability to the estate, as security in the bond for the amount due by the defendant, and not an *actual* payment,—it was proved that such an action was sustainable in Massachusetts by the law of that country, the amount for which the security was liable being considered as paid by operation of law on his appointment as administrator.

Held, that for the purpose of administering the foreign law, the action was maintainable here.

Assumpsit for money paid by the plaintiff to the defendant's use, in Boston, Massachusetts, tried before RITCHIE, C. J., at the last St. John Circuit. A verdict was taken for the plaintiff by consent, with leave to the defendant to move to enter a nonsuit, on the ground that it was not proved that by the law of Massachusetts the action would lie. The facts are fully stated in the judgment of the Court.

Jack, Q. C., on a former day in this term, accordingly moved to enter a nonsuit. He contended that to support the action there must be an actual payment of money by the plaintiff. All that was proved of the law of Massachusetts was, that when a debtor of an estate was appointed executor, the debt was considered as paid by operation of law. But the plaintiff was not a debtor to the estate, nor liable to the deceased. It was necessary for the plaintiff to prove: that in Massachusetts an action for money paid could be maintained under the facts established here; but that was not proved. If the plaintiff, as surety for Hazelton, the administrator, had actually paid the money without suit, no doubt he could have recovered the amount in an action for money paid; but he paid no money, though he may be liable to account to the Judge of Probates for the amount of Hazelton's liablity. It was not enough that a witness should give his opinion that such an action as this would lie in Massachusetts; he was bound to show what the foreign law was. [RITCHIE, C. J., referred to McCormick *v.* Garnett, (27 Eng. R. 339), as to the proof of foreign laws].

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

This was an action to recover $25,000, as money paid by the plaintiff to the use of the defendant. One Charles Valentine, of Massachusetts, in the Uuited States, died in Boston about January, 1850, and by his will appointed one Chamberlain his executor, who obtained probate, and took on himself the executorship of the estate; but not having conducted himself faithfully in the discharge of his duties, he was dismissed from the office by the proper Court in Massachusetts, and the defendant was appointed administrator, *cum testamento annexo de bonis non.* The plaintiff and his brother became sureties for defendant, and as such, joined the defendant in a bond to the Judge of the Probate Court, for securing the faithful discharge of his duties as administrator, &c. A large amount of the assets and property of the estate came to the hands of the defendant as administrator, which he failed duly to administer, whereby the administration bond became forfeited. The parties interested in the estate, with much difficulty, succeeded in getting the defendant to file his

accounts in the Probate Court, which after being duly examined and passed by the Court, established a balance in his hands of $40,000 unaccounted for. Defendant being unable or unwilling to pay over this amount, resigned the office of administrator, and the plaintiff was appointed administrator *cum testamento annexo de bonis non.*

The plaintiff now claims, that having, as security for defendant, become liable to the estate for the balance due by the defendant, and having become administrator of the estate, by the law of Massachusetts the amount so due from him is regarded as paid into his hands by himself, by operation of law, and he becomes liable, as administrator, for the amount as assets in his hands; and by the like law, that he can maintain an action againt his principal, and recover the amount at law, as for money paid for the principal's use. If such is the law of Massachusetts, it is clear that on the party's coming within and suing in this Province, this Court will enforce his rights under the law of Massachusetts, as the law shall by evidence be made to appear to this Court. In this case there is no conflict of evidence. Judge Richardson, the Judge of Probates for the County of Middlesex for upwards of eleven years, and a member of the bar over twenty years, says in his examination, taken at Boston, that he is acquainted with the laws of Massachusetts, and on the question being put to him, "When a person indebted or liable to an estate, is "appointed by the Probate Court administrator *de bonis non*, how "is the amount due by him treated under the laws of the Common-"wealth?" He answered: "The amount due is regarded as paid "into his hands by operation of law, and he becomes liable as "administrator for the amount, as assets in his hands." The evidence shews that independent of this, the plaintiff distinctly admitted his liability.

Fairbanks, a lawyer of twenty years standing, testifies that "where a surety on an administration bond is appointed adminis-"trator *de bonis non*, the moment he qualified, the money he was "liable for on the bond was paid to him, and he had a right of "action on the bond against his principal; such an action as this "(the present action) is clearly sustainable in Massachusetts by the "law of Massachusetts."

This evidence is wholly uncontradicted; and we may fairly assume that its accurracy cannot be impeached, as it appeared on the trial that the defendant was himself a lawyer of very long standing in Massachusetts; and if the account thus given of the law was incorrect, it may fairly be presumed he would, if not by other evidence, at any rate by his own, have pointed out the error. As, therefore, there is no question as to the law of Massachusetts, all we have to say is, that if the plaintiff had a right of action by the law of Mas-

sachusetts, against the defendant, as for money paid to his use, and if such an action as this is clearly sustainable against the defendant there, it is equally maintainable here, we have only to administer the law of Massachusetts, in the same manner as we are by evidence informed that the Courts would administer it there; provided it can be done consistently with the forms and practices of our own Courts.

Rule refused.

THE QUEEN *v.* SPARROW and others.

OCTOBER 16.

The sureties in a recognizance entered into under the Rev. Stat. c. 98, "of Controverted Elections," cannot plead, that they entered into it by a fraudulent representation of the nature of it, believing it to be the obligation of the principal only.

If the recognizance was obtained by fraud, the sureties should apply to the Court to vacate it; but while it stands as a record, they are estopped from denying the truth of it.

Debt on a recognizance entered into by the defendants, Sparrow and Boss, as sureties for Wm. End, under Rev. Stat. cap. 98 of Controverted Elections.

The defendants, Sparrow and Boss, pleaded that they did not appear before the Justice named in the supposed recognizance, and acknowledge themselves to owe the Queen the sum of £100 each, as was alleged in the declaration, and that the signature of the said Justice was obtained, and he was induced and procured to sign the said supposed recognizance by fraud and misrepresentation; that is to say, that the defendant, Wm. End, falsely and fraudulently represented to the said Justice that the supposed recognizance was the recognizance of him, the said Wm. End, only, and that the said Wm. End read or pretended to read the supposed recognizance to the said Justice as the recognizance of himself, the said Wm. End only, and procured the said Justice to sigh the same without reading it, and that the said Justice signed the said supposed recognizance, confiding and believing that the representations of the said Wm. End were true. Demurrer.

A. L. Palmer, Q. C., in support of the demurrer, was stopped by the Court, who called on

S. R. Thomson, Q. C., in support of the plea. He contended that although a plea of fraud might not formerly have been good, yet

late authorities seemed to shew that such a plea might be pleaded. Philipson v. Earl of Egremont (6 Q. B. 587). [RITCHIE, C. J.: The record of the Court is, absolute verity.]

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

This was an action of debt on a recognizance entered into by the defendant, Wm. End, as principal, and other defendants as sureties, under the Rev. Stat., cap. 98, "of Controverted Elections."

The defendants, Sparrow and Boss, pleaded that they did not appear before the Justice named in the supposed recognizance, and acknowledge themselves to owe the Queen the sum of £100 each, as was alleged in the declaration, and that the signature of the said Justice was obtained, and he was induced and procured to sign the said supposed recognizance by fraud and misrepresentation; that is to say, that the defendant, Wm. End, falsely and fraudulently represented to the said Justice that the supposed recognizance was the recognizance of him, the said Wm. End, only; and that the said Wm. End read or pretended to read the said supposed recognizance to the said Justice, as the recognizance of himself, Wm. End, only, and procured the said Justice to sign the same without reading it, and that the said Justice signed the said supposed recognizance, confiding and believing that the representations of the said Wm. End were true.

The Attorney General demurred to this plea, and we have no doubt that it is bad, and that a party to a record cannot plead that the facts therein stated are not true, but must apply to the Court to set it aside, if it has been improperly obtained.

In Rex. v. Carlisle (2 B. & Ad. 367), Lord Tenterden delivering the judgment of the Court, said, "The authorities are clear, that a "party cannot be received to aver as error in fact, a matter contrary "to the record. In 1 Inst. 260, Lord Coke says, 'the rolls being the "records or memorials of the Judges of the Courts of Record, im-"port in them such incontrollable credit and verity, as they admit "of no averment, plea or proof to the contrary.'" And in Huffer v. Allen (Law R. 2 Exch. 18), Kelly, C. B., says, "It is not competent "to either party to an action to aver anything either expressing or "importing a contradiction to the record, which, while it stands, is "as between them, an evidence of uncontrollable verity." See also, De Medina v. Grov (10 Q. B. 152). The cases of Philipson v. Earl of Egrement (6 Q. B. 587), cited by the defendant's counsel, does not in the slightest degree conflict with this rule, but, on the contrary, is quite in accordance with the doctrine established in the Duchess

of Kingston's case (2 Smith's L. Cases, 432), that "in civil suits all "*strangers* may falsify, for covin, either fines, or real or feigned "recoveries; and even a recovery by a just title, if collusion was "practiced to prevent a fair defence; and, this, whether the covin is "apparent upon the record, as not essoining, or not demanding the "view, or by suffering judgment by confession or default; or extrin-"sic, as not pleading a release, collateral warranty, or other advanta-"geous pleas." So, in Prudham *v.* Phillips (Amb. 763), where in answer to evidence of the defendant's marriage, the plaintiff, at Nisi Prius, shewed a sentence of the Ecclesiastical Court annulling the marriage, and it became a question whether the defendant could prove that the sentence was obtained by fraud. Willes, C. J., held that a person who was party to a judgment could not offer such proof in a subsequent proceeding to invalidate the judgment, for he might have applied to the Court which pronounced the judgment to vacate it; and in that respect his case differed from the case of a stranger.

In the case of Philipson *v.* the Earl Egremont, the plaintiff had recovered a judgment against one J. Bleadon, as the registered officer of a public company of which the Earl of Egremont was a member; and on *scire facias* upon the judgment, the defendant pleaded that it was obtained by fraud and collusion between this plaintiff and Bleadon, and for a demand in respect of which neither the company, nor the then defendant, nor Mr. Bleadon, as the registered officer, was by law liable; it was held the plea was good. Lord Denman, delivering the judgment of the Court, says: "The defendant certainly "ought to have some remedy, and the question is, whether the rem-"edy is by pleading, as he has done, or by motion to the Court. "We are far from saying that the latter course was not open to the "defendant. Fraud, no doubt, vitiates everything; and the Court, "upon being satisfied of such fraud, has a power to vacate, and would "vacate its own judgment, as is suggested in Bradley *v.* Eyre (11 M. "& W. 450). But still such a plea as the present may be good; and "indeed we find in Fowler *v.* Rickerby (2 M. & G. 760), that Tindal, "C. J., stated that it would be good. If the plea had alleged a fraud "practiced on the original defendant, it would have been open to the "answer already made to the fourth and sixth pleas; but as it alleges "fraud and collusion between the plaintiff and the defendant in the "action, for the purpose of charging the present defendant, there "was no opportunity for him to plead to it before." In that case the Earl of Egremont was not a party to the record, and therefore was not estopped from denying the truth of it. The same principle was acted on in this Court in the case of McKay *v.* Crocker (Hil. T. 1861), where the defendant, a judgment creditor of one Donnelly, was allowed to shew on a trial at Nisi Prius, that a judgment obtained

by the plaintiff against Donnelly was obtained by fraud and collusion.

We had no doubt during the argument, that the plea in the present case was bad, and an examination of the cases referred to by the defendant's counsel has confirmed us in that opinion; the judgment, therefore, must be for the Crown; but the defendants may have leave to amend their plea, on payment of the costs, within thirty days after taxation thereof.

Judgment accordingly.

THE QUEEN *v.* THOMAS RYAN and JOHN RYAN.

OCTOBER 16.

The Rev. Stat., c. 159, § 16, by which on a trial for felony the jury is authorized to acquit of the felony, and find a verdict of guilty of a misdemeanor, if the evidence warrants it, establishes a general mode of procedure in all criminal cases, and is not confined to felonies existing at the time of the passing of the Statute; therefore on an indictment for a felonious assault under the Act 25 Vict., cap. 10, the prisoner may be found guilty of an assault only.

The prisoners, with one Connell, were indicted at the last St. John Circuit, before ALLEN, J., for feloniously and maliciously making an assault upon Bernard Brannen, and feloniously and maliciously causing him bodily harm with intent to disfigure him, against the form of the Statute, &c. The second count charged the assault with intent to maim, and the third count, with intent to disable Brannen. The prosecutor stated, on cross-examination, that he did not think the prisoners intended to maim, to disfigure, or to disable him.

There being no evidence against Connell, the learned Judge directed him to be acquitted at the close of the prosecution.

The prisoners' counsel contended that it was necessary to prove a joint acting of the three defendants; also, that as the intention to maim was disproved, the prisoners Ryan could not be convicted of a common assault on this indictment; but the learned Judge directed the jury that a joint acting was not necessary; that one of the prisoners might be convicted and the others acquitted, if the evidence warranted it; that the intention with which the assault was committed was a question for them, to be determined by considering the manner in which the prosecutor was attacked and beaten; and that if they did not think the assault was made with the intent charged in the indictments, they might find the prisoners guilty of a common assault.

The prisoners were found guilty of a common assault, and a question was reserved for the consideration of the Court, whether such finding was good under this indictment.

D. S. Kerr, Q. C., in Trinity Merm last, moved to arrest the judgment. The indictment is in the language of 25 Vict., c. 10, § 1, and contains three charges—to maim, disfigure, and disable. The question was, whether there was an intention on the part of the prisoners either to maim, to disfigure, or disable, and this intention being ignored, can they be convieted of a common assault? This being a proceeding under the Statute, the prisoners cannot be convicted of an assault which was not charged in the indictment, and which they were not prepared to defend. The offence charged in the indictment having been made a felony since 1 Rev. Stat.. c. 159, § 20, the prisoners cannot be convicted under that Statute, for the words "felony which shall include an assault," in § 20, must be taken to mean what were then felonies, and not what have become so since that time.

Watters, Q. C., contra. The offence charged being a felony, the prisoners were liable to be convicted of an assault under the Revised Statutes, c. 159, § 20, which enacted, that "whoever on a trial of "murder, or manslaughter, or any other felony which shall include "an assault, shall be convicted of an assault only, shall be imprisoned, "&c." This was intended to apply not only to felonies then existing, but any felony afterwards created. It was intended as a general rule of practice, overriding the whole criminal law. Reg. v. Ellis, (8 C. & P. 654). By 1 Rev. Stat., c. 159, § 16, "on the trial of any "person for felony the jury may acquit of the felony, and, if the "evidence warrant, find a verdict of guilty of a misdemeanor." The evidence clearly warranted the conviction for an assault, which was a misdemeanor at common law. Section 10 of the same chapter, relating to challenges, was not intended to be confined to felonies then in existence, but as a general regulation for trials in criminal cases.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

The prisoners were indicted under the Act 25 Vict., c. 10, for feloniously and maliciously making an assault upon Bernard Brannen, and feloniously and maliciously causing him bodily harm, with intent to disfigure him. The second count charged the assault with intent to maim, and the third, with intent to disable Brannen.

The assault was proved, but the prosecutor stated on cross-exami-

nation, that he did not think the prisoners intended to maim, disfigure, or disable him. The jury negatived the intent, and found the prisoners guilty of a common assault, of which offence their counsel contended they could not be convicted upon the indictment, because the Act allowing a person to be convicted of an assault, was passed prior to the 25 Vict., c. 10, and therefore did not apply to felony subsequently created. The learned Judge reserved this question for the consideration of the Court.

The Revised Stat., Title XL., deals with "the administration of "criminal justice." Chapter 156 of that Title, treats of proceedings before indictment; chapter 157, of recognizance in criminal cases; chapter 158, of the proceedings on indictment; and chapter 159, of trial. Under this chapter, all trials of a criminal character at the Assizes and Sessions are conducted, and it is not in any way, in our opinion, limited or confined to felonies or offences existing at the time of the passing of the Statute, but establishes the general rule of practice and proceedure, in all cases that may come before the Court for adjudication. It secures to the prisoner full defence by counsel; entitles him to a copy of the indictment and depositions; regulates his peremptory challenges, and among a variety of other provisions to govern the Court on trials by indictment, gives the presiding Judge the power to reserve any question of law, which may have arisen during the trial, for the consideration of the Supreme Court, and under which provision alone this Court has any power to deal with the case as now presented.

By Sect. 16 of this chapter, it is provided that "on the trial of "any person for any felony, the jury may acquit of the felony, and, "if the evidence warrant, find a verdict of guilty of a misdemeanor, "and the Court may proceed to punish the offender as if he had been "convicted therefor."

If Sect. 16 does not apply to this case, Sect. 23, under which the Judge reserved the question, is equally inapplicable, and we should have no power to interfere. But we do not desire to intimate the slightest doubt as to chapter 159 applying, in the words of the Act, to "the trial of *any* person for *any* felony," though created subsequent to the passing of the Revised Statutes.

It was contended by the counsel for the prisoners, that because by Sect. 5 of the Act 25 Vict., cap. 10, it was declared that a person indicted for felony under Sect. 3 of the Act, for unlawfully administering poison to any person, so as thereby to endanger life, might be acquitted of the felony and found guilty of a misdemeanor, for administering, &c., with intent to injure; and because no such provision was made with respect to the felonious offences described in the first Sect. of the Act; that, therefore, where a person was indicted for

felony under the first Sect., the jury could not acquit of the felony and find him guilty of a misdemeanor, according to the maxim *expressio unius est exclusio alterius.* But the distinction is obvious. The offences described in the first Sect., wounding and shooting at a person, include an assault in contemplation of law, and therefore it was not necessary to declare in the Act, that the person indicted might be acquitted of the felony and found guilty of a misdemeanor, because the law had already made provision for cases of that kind; but poisoning did not include an assault, and therefore without the provision in Sect. 5, if a person indicted under the third Sect. of the Act was acquitted of the felony, he could not be convicted of a misdemeanor. See Reg. *v.* Bird, (2 Law & Eq. R. 466), per Alderson B.

For these reasons, we think the conviction of the prisoners should be affirmed.

Conviction affirmed.

TAYLOR *v.* SMITH.

OCTOBER 16.

A vessel was driven on shore, and being supposed to be a total loss, notice of abandonment was given to the Underwriters, They refused to accept the abandonment, got the vessel off, brought her to St. John, her port of destination, in a place of safety, before action brought, and required the owner to take charge of her. The cost of repairing her after she was brought to St. John by the Underwriters, would be loss than her value when repaired.

Held, that the right of the assured to recover depended upon the state of facts existing at the time the action was brought, and that he could only recover for a partial loss.

This was a special case. It set forth that the brig "P. I. Nevius," on the 3rd December, 1866, being in every respect seaworthy, sailed from Havana for St. John, N. B., in ballast, and continued on her voyage until the 20th December, when she was driven on shore near Digby, N. S., in a snow storm, while endeavoring to run into Digby for a port of safety. The master and crew abandoned the vessel fearing she would go to pieces. The master went to Digby, the nearest port, noted his protest, and on the 21st telegraphed to the owners, in St. John, that the vessel was ashore and likely to become a total loss; the plaintiff, (one of the owners), the same day gave information of the loss, with all the facts known to him, to the brokers through whom the policy had been effected, and at the same time served on them a notice of abandonment, which they were authorized to receive. The brokers refused to accept the abandonment, and notified the owners to use all necessary means to save the vessel

They afterwards hired a steam tug, sent her to Digby, and succeeded in bringing the vessel to St. John, to a place of safety on the 15th January, and on the same day notified the plaintiff of the vessel being in St. John, and that they handed her over to him for repairs, and required the captain and owners to continue in charge of her, and use such care and diligence as might be necessary for her preservation. Prior to the arrival of the agent of the Underwiters at Digby, the captain called a survey of the vessel, and the surveyors made a report condemning her as unseaworthy, which report had not been acted upon when the Underwriters' agent took possession of the vessel.

It was admitted that the expense of getting the vessel off, bringing her to St. John, and of repairs, would exceed her value when repaired; but that her value when repaired would be more than the cost of the repairs after she was towed to St. John by the Underwriters. It was also admitted that there was no waiver or acceptance of the abandonment at any time. The fact of the plaintiff, having, on the 14th March, 1866, effected a policy on his interest in the vessel, for twelve months from that date for $800 was admitted, and that defendant was an Underwriter on such policy for $200.

The question submitted for the consideration of the Court was, whether the plaintiff was entitled to recover for a total or a partial loss?

Gray, Q. C., for the plaintiff. We claim we have a right to take into consideration not only the cost of repairing the vessel, but that of bringing her to St. John. Being in ballast, there was no cargo and freight to contribute. The plaintiff having acquired a right to give notice of abandonment, subsequent circumstances cannot alter it. 2 Arnold Ins. 1091. The circumstances in which this vessel was placed were such as would justify a prudent man in abandoning her even if uninsured. [RITCHIE, C. J. We are with you thus far, but the point to be argued is, whether the subsequent events do not modify the notice of abandonment]. In Holdsworth *v.* Wyse, (7 B. & C. 794), where a ship was deserted by her crew acting *bona fide*, and afterwards brought into port by another vessel and repaired, it was held that the owners having given notice of abandonment before they heard of the ship's safety, were entitled to recover against the Underwriters for a total loss. [RITCHIE, C. J. Giving notice of abandonment does not absolutely vest the right to recover for a total loss]. Parry *v.* Aberdeen, (9 B. & C. 411), is another case in point; and in Reimer *v.* Ringrose, (6 Ex. 267), Alderson, B., designates as a total loss where "the expense of repairing and bringing home a ship

"would exceed the value when brought home." Kemp *v.* Halliday, (1 Law Rep. Q. B. 520).

C. W. Weldon, for the defendant, was not called on.

RITCHIE, C. J. This is a very plain case. When the vessel was driven ashore and likely to become a total loss it was quite competent for the owners to give notice of abandonment, and equally competent for the Underwriters to refuse to accept it. A survey is called, and the vessel is condemned by the surveyors, but subsequent circumstances prove their Judgment to have been erroneous. Before the survey is acted upon, or the action brought, a change takes place in the circumstances under which the notice of abandonment was given. The Vessel, instead of being on the rocks near Digby, liable to be destroyed by the first gale, is in the harbor of St. John in safety, and capable of being repaired at a less cost than her value when repaired. By the American law, an abandonment once rightfully made would be binding and conclusive between the parties, and the rights flowing from it become vested rights, and are not divested by subsequent events. 3 Kent's Com. 324; But by the Enlish law it is not so. There it has been long established that even although the facts were such as to justify the assured in giving notice of abandonment, yet the abandonment is not absolute, but is liable to be controlled by subsequent events; and if the loss has ceased to be total before action brought, the abandonment becomes inoperative. The right to recover depends on the state of things existing at the time the action is brought. 2 Arn. Ins. 921. The assured cannot recover as for a total loss, if the ship be restored, before he commences his action, in such a state that he may reasonably be expected to take possession of it. The plaintiff is only entitled to recover for a partial loss.

WILMOT, J. I am of the same opinion.

ALLEN, J. The contract for insurance is one of indemnity from loss, and if the vessel is repaired and placed in as good a position as before, I cannot see what more the owner requires. He ought not to receive more than the amount of his loss. The cases establish that if the offer to abandon was made on supposed facts which were thought to exist at the time, but which in fact did not exist, the assured could not insist upon the abandonment, and recover for a total loss.

WELDON, J. concurred.

Judgment for the plaintiff for the amount of partial loss.

DESBRISAY *v.* MCLEOD.

OCTOBER 16.

The first count of a declaration stated that on the 1st November, 1865, in consideration of the assignment of licence No. 84, made to defendant by plaintiff, at defendant's request, defendant undertook and promised that F. should deliver to plaintiff whatever quantity, say, not to exceed 165,000 feet of logs by the 10th July then next,—Averment, that although the time for the delivery of the logs had elapsed, and the plaintiff was ready and willing to receive them, yet F. did not deliver them. whereby, &c.

The fourth count stated that on the day and year aforesaid, in consideration of the assignment by the plaintiff to the defendant of a certain licence, then and there agreed upon between them, defendant undertook and promised that F. should deliver plaintiff, whatever quantity of logs said F. had before then agreed to deliver plaintiff in the year 1866, not to exceed 165,000 feet, by the 10th July then next,—Averment that F. had agreed to deliver plaintiff 135,000 feet in 1866. Breach,—that F. did not deliver the logs.

Held. 1st. That a sufficient consideration for defendant's promise was alleged, but that the promise, as stated in the first count, was uncertain and unintelligible. 2nd. That the words, "on the day and year aforesaid," in the fourth count, did not necessarily refer to the 10th July, 1866 (the last day mentioned in the preceding count), but might refer to the 1st November, 1865; and being only an ambiguity, the objection could not be taken on general demurrer.

Special assumpsit. The first count of the declaration stated, that heretofore, to-wit, on the first November, 1865, in consideration of an assignment of the license number eighty-four, made to the defendant by the plaintiff, at the defendant's request, the defendant undertook, &c., that the Fergusons should deliver to the plaintiff whatever quantity, say, not to exceed 165,000 superficial feet of merchantable saw logs, by the 10th July then next. Allegation, that although the time for delivery had elapsed, and the plaintiff was ready and willing to receive the same, yet the Fergusons did not deliver the said logs, or any part thereof, to the plaintiff, whereby the plaintiff was not only deprived of the said logs, but his mill had thereby been kept idle for the want of logs. The second count the same as the first, except alleging consideration to be, assignment of the license number 169. The third count was the same as the two first, except alleging the consideration to be that the plaintiff had assigned to the defendant "a certain license then and there agreed on between them." The fourth count, stating the contract to have been made on the day and year aforesaid; same consideration as in third count, stating the defendant's undertaking to be that the Ferguson's (that is to say, Robert and Archibald Ferguson) should deliver to plaintiff whatever quantity of said logs the said Ferguson had before that time agreed to deliver to the plaintiff, in the year 1866, say, not to exceed 165,000 superficial feet, by the 10th July then next—averment, that Fergusons had agreed to deliver to plaintiff in 1866, 135,000 superficial feet; that Fergusons did not deliver the

logs, whereby plaintiff's mill was kept idle. Fifth count, that in consideration that the plaintiff had assigned to the defendant a certain license, then and there agreed on between them, the defendant undertook that the Fergusons should deliver to the plaintiff 165,000 superficial feet, &c., by the 10th July. Averments and breach as before. Demurrer.

Palmer, Q. C., in Trinity Term, in support of the demurrer. 1. The declaration is defective, because it contains no proper allegation of any consideration; it does not state what the license is. [ALLEN, J.: It might be a tavern license.] When a thing is made a consideration, the rules of pleading require that some value should be shewn. The intendment is against the pleader, and if he shew no consideration the pleading fails. (Stephens Pleading, 324, 328). A license is not assignable in law. [RITCHIE, C. J.: Does not the assignment of the license shew a consideration?] If a consideration for a promise does not sufficiently appear on the face of the declaration, it cannot be supported. Jones *v.* Ashburnham (4 East. 465).

D. S. Kerr, Q. C., contra. These objections to the declaration are all grounds of special demurrer. When the license was assigned at the special instance and request of the defendant, it is a matter of intendment that it was assignable and valuable. A license is a thing recognized by law, and made assignable. 1 Rev. Stat., cap. 133, § 6. It is not necessary to state the value of the consideration. Ward *v.* Harris (2 B. & P. 265). A timber license being the only one assignable by our law, does not the term license, coupled with the allegation of it being assignable, make it sufficiently certain to escape special demurrer? If a person in whose favor a promise is made, forego some advantage or benefit, which otherwise he might have taken or had, or suffer a loss in consequence of such promise, it raises a sufficient consideration. Mallory *v.* Lane (Cro. Jac. 342).

Palmer, Q. C., in reply. A vague and meaningless contract is no contract in law, and cannot be recovered on.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

The first objections raised on this demurrer are, that there is no sufficient consideration set forth to support the alleged promise; and that it does not appear that the license alleged to have been assigned was of any value; nor for what purpose it was a license; nor whether it was such a license as was assignable. Great accuracy is no doubt required in the statement of the consideration, which in an action of

assumpsit, forms the basis of the contract; but it is quite clear that it is not necessary to state executed considerations, with the certainty of time and place required in stating executory considerations, nor with the same particularity in other respects as to quantity, quality, value, &c. It is only necessary to state, in cases of executed considerations, that the consideration for the defendant's promise moved at his request. 1 Saunders, 264, Note 1; King v. Sears (2 C. M. & R. 48). The executed consideration must, in legal estimation, be of some value. It cannot be said in this case, that the assignment of the license by the plaintiff was of no benefit to the defendant, or detriment to the plaintiff. The performance of any act by the plaintiff, which he was not legally bound to perform, would suffice. Thus in Wilkinson v. Oliveira (1 Bing. N. C. 495), the declaration, after stating that divers disputes and contentions had arisen, between defendant and divers others persons, respecting the disposition of the estate of one Dominic Oliveira, and the right of the defendant to the possession of any and what part thereof, it became necessary to prove certain facts stated, and that plaintiff was lawfully possessed of a letter which proved such facts, and at request of defendant gave him such letter for the purpose of proving such facts; that defendant used the letter for such purpose, and that by means of such letter, and of the matters therein contained, the defendant was enabled to, and did cause, the said disputes to be determined in his favor, and did by means of the said letter, and the matters therein contained, became lawfully possessed of and acquired a large portion of the estate of the said D. O. and thereupon in consideration thereof, and that the plaintiff at the special instance and request of the defendant had then and there given the said letter to defendant, defendant promised plaintiff to give him £1,000. To this defendant pleaded that he was not by means of the letter enabled to, and did not by means thereof, cause the said disputes to be decided in his favor, and did not by means of the letter become possessed of a portion of the estate of D. O. To this plea there was a demurrer, and the Court gave judgment for the plaintiff. The reason why, in stating an executory consideration, a greater degree of certainty is required, is simply because where the consideration is executory, in order to shew that plaintiff possessed a right of action, it is in general necessary to aver performance of the consideration on his part, which allegation being material and traversable, must be made with proper certainty: the allegation of every performance, necessarily requiring the plaintiff to state the consideration with a greater degree of certainty and minuteness, than in the case of executed considerations; otherwise the Court would be unable to judge, whether the performance averred in the declaration was sufficient. For these reasons, we

think the two first objections cannot prevail. It is thirdly objected that the promise is not sufficiently laid to take issue on it, but is vague, general, indefinite, and uncertain. A contract should be stated with such certainty and precision, as will enable the Court to form a just idea of what the contract actually was, and as will furnish the jury with a criterion in the assessment of damages. It is sufficient for us to say, that the promises as set out in the first three counts of this declaration are simply meaningless; the Court cannot draw an intelligible conclusion from what is stated. It is impossible to read them, and give a reasonable intendment to the expressions used. The fourth and fifth counts are not open to this objection, the promises being set out intelligibly, clearly, and with certainty. As to the objection that the cause of action in the second, third and fourth counts, had not arisen or accrued at the time of the commencement of the action; in these several counts the contracts respectively are alleged to have been made, "on the day and year aforesaid," instead of the day and year *first* aforesaid, the last day mentioned in the first count being the 10th July then next, which would be the 10th of July, 1866, which it is urged must be "the day and year aforesaid." If this, instead of the first date, viz., the first November, 1865, is referred to, the time alleged for the delivering of the logs in all these counts, would certainly be after the action brought. The language of pleading is to have a reasonable intendment and construction, and when an expression is capable of different meanings, that shall be taken which will support the declaration, &c., and not the other, which would defeat it. (1 Chitty Pldg. 237). This, however, is at most an ambiguity. We cannot say of necessity that the 1st November, 1865, was not, or that the 10th July then next was, the date referred to; and as was said in Grottick v. Phillips (9 Bing. 723): "This is an objection of which the party cannot avail himself on "general demurrer. * * If the objection be made on the score of "ambiguity, the ambiguities ought to have been pointed out by spe-"cial demurrer." In addition to which, in this case there is an express averment, that the time of delivery had long since elapsed, which clearly shews on the face of the declaration, that the cause of action had arisen or accrued at the time of the bringing of the action; and, threfore, necessarily shews, that the first date mentioned in the declaration was the one referred to.

There is nothing in the other objections. There will be judgment for the defendant, on the demurrer to the three first counts, and for the plaintiff, on the demurrer to fourth and fifth counts. Both parties to be allowed to amend, on payment of costs, within thirty days after taxation.

In re ISAAC C. FROST.

(Equity Appeal.)

OCTOBER 16.

The executors of a deceased administrator, have no right to file an account of his administration in the Probate Court; nor has the Judge of Probates any authority to pass such an account if filed.

If an administrator dies without having filed an inventory or account, and his executors have assets in their hands, belonging to the original estate, a Court of Equity will compell them to account.

This was an appeal from the decision of the Judge of Probates of the County of York, refusing to issue a citation to attend the passing of the accounts of the said Wm. Wright, as administrator *cum testamento annexo* of Isaac C. Frost, such account having been rendered and filed by the executors of Wm. Wright.

Jack, Q. C., in support of the appeal, cited Wms. Exors. 3 Ed. 783; 2 Seaton Dec. 738; Gale *v.* Luttrell, (2 Add. 234); Holland *v.* Prior, (1 M. & K. 245; Davenport *v.* Stafford, (14 Beav. 319).

Cur. adv. vult.

RITCHIE, J. C., now delivered the jndgment of the Court.

This was an appeal from the decision of the Judge of Probates of the County of York. Isaac C. Frost, a resident of the United States of America, died there, having made a will, appointing Mary C. Frost executrix, who took upon hersef, in New York, the administration of the estate, and authorized the late William Wright to take out administration *cum testamento annexo*, in this Province. Mr. Wright obtained letters of administration in this Province, and died without filing any account. Administration *cum testamento annexo de bonis non* was then granted to D. C. Perkins. Mary C. Frost, the executrix, applied by Petition to the Judge of Probates of York, alleging that the said William Wright died on or about the 10th May, 1865, without having filed any account of his administration; that by his last will and testament, he appointed Eliza Wright and William M. Wright, the executrix and executor thereof, which will was duly proved; that his said executors have filed in this (the Probate Court) the account of the said William Wright of his administration of the estate of the late I. C. Frost, showing a considerable balance in his hands unadministered at the time of his death; that D. C. Perkins was duly appointed administrator *de bonis non cum testamento annexo* of the estate of I. C. Frost in this Province; and praying that a citation might issue, calling upon all parties interested, to

appear and attend the passing of the said account. The Judge of Probates refused the citation on the ground, that the executors of the estate of William Wright could not file an account, that he could recognize as the account of the administrator of Frost's estate; that they were amenable to the Probate Court; and that he (the Judge of Probates) could not make a decree ordering them to pay over any money to the petitioner. From this decision, Mary C. Frost appeals, on the ground that she is entitled, as executrix of the last will and testament of the late Isaac C. Frost, to receive such sum of money as shall be remaining unadministered, of the estate and effects of the said Isaac C. Frost in this Province, in the hands of the late William Wright, as administrator *cum testamento annexo* at his decease; and for that purpose to have the accounts of his administration passed in that Court; and more especially as she cannot claim upon his administration bond, until the said account has been duly passed in that Court.

The authority and jurisdiction of Judges of Probates in this Province is now regulated by the Revised Statutes, c. 136, by which they are authorized "to grant administration of the estates of de-"ceased persons, in the manner hitherto in use, subject to the rules "and directions by that chapter prescribed." Before granting letters of administration, the Judge of Probates shall take from the person applying therefor, a bond (A) with two sureties, to be approved by him, according to the form of the Schedule. The condition of this bond, *inter alia*, is that if the administrator do make a true and faithful inventory, &c., and exhibit the same unto the Judge, &c., and do well and truly administer according to law, and further do make a true and just account of the said administration, at or before the ——— day of ———, and all the rest of the said goods, chattels, and credits, the same being found remaining upon the said administrator's account, which shall be first examined and allowed of, by the said Probate Court or other Courts of competent authority, in that behalf, do deliver and pay to such person as the said Court, or other competent Court, by sentence or decree shall adjudge. By Section 12, "the executor of a sole or surviving "executor of any will, shall not be the executor of the first testa-"tor's will, but he may have administration with the will annexed." Sections 23 and 24, relate to the rendering and passing accounts, and are as follows: By Sect. 23, "Every executor shall render an account "of his administration to the Judge of Probates, unless he other-"wise allow, within eighteen months from the Probate or adminis-"tration; and after that he may be cited to do so on the application "of any person interested." * * And by Sect. 24, on the filing of any account, a citation (C) may issue on the application of the party

filing the same, or of any person having an interest therein, requiring all parties interested to appear before the Judge at a time not less than thirty days from its date, to attend the passing thereof. The cases cited on behalf of the appellant, no doubt establish very clearly, that the representatives of a deceased administrator *cum testamento annexo*, although not at the same time those of the first testator, were liable to be called on by the English Ecclesiastical Courts, for an inventory and account, upon a reasonable presumption being raised, that any part of the effects of the first testator had travelled into their hands; and that the executors of a deceased executor, though not the personal representatives of the original testator (there being an executor of the original testator still surviving), are in like manner compelled to bring in an inventory of the effects of the original testator. The application in the present case was not for a citation, calling on the executors of Wm. Wright, to produce an inventory of the property of the estate of I. C. Frost, in their hands, or an account of their dealing with the assets of the said estate, which may have come into their hands; but for all persons interested to attend the passing of the account which the executors of Wm. Wright have filed—not of their, but his, administration of the estate of I. C. Frost. No doubt, if the executors of Wm. Wright admit, or are proved to have assets of the original testator in their hands, they would be liable to account for the same, in like manner as the administrator would be if living. The Court of Equity, at any rate, has full power to enforce this. That the power of the Probate Court in this Province, under the Revised Statutes, is in this respect coextensive with the Court of Equity, by no means necessarily follows—a point which it will be time enough to decide when the parties raise the question, which they do not in this case; for it does not appear that the executors of Wm. Wright have in any way intermeddled with the estate of I. C. Frost, or that any effects or assets of that estate have ever come to their hands. We will not say, that if they admit there was a considerable balance in the hands of their testator, unadministered at the time of his decease, this may not, *prima facie*, raise such a reasonable presumption, that effects of the first testator had come to their hands, as would warrant the Judge of Probates in assuming he had jurisdiction over them, in citing them to exhibit an inventory, and calling on them to account for the assets which may have actually come into their hands, or under their control; but we are wholly at a loss to discover any authority by which the executors of an administrator can file the accounts of the administration of the administrator in the estate; or if they do file accounts purporting to be the accounts of the administrator, any authority in the Judge of Probates, to cite the par-

ties interested to pass such accounts; and should he proceed to pass the accounts, any power to bind the parties interested in the estate, still less the sureties to the administration bond, by any decree he might make. It may be, that the administrator in his life time may have kept very loose and inaccurate accounts, or wholly neglected his duty as administrator, and squandered, misapplied, and wasted the estate and effects of the original testator which came to his hands, and consequently no effects may ever have come to the hands of his executors; and that the administrator's estate is wholly insolvent and unable to make up the deficiency. We by no means wish it to be considered that such was the case in this instance, for we have no facts before us, we merely put the case by way of illustration. The party then really interested in the accounts of the administrator, would be his sureties on the administration bond. To allow his executors, whom we have seen it is by statute expressly declared shall not be executors to the first testator's will, to intermeddle with the estate, stand in the place of the original administrator, and in his name and on his account, and as binding his sureties, file accounts of his transactions with which they had nothing to do, and in connection with an estate of which they are declared not to be the representatives, and of which transactions they may or may not be in any way personally cognizable, would, in our opinion, almost necessarily lead to difficulties of the most serious character, not only with respect to parties interested, in the original testator's estate, but with those interested in the estate of the administrator, and more particularly with reference to the sureties on the administration bond, and the rights and liabilities of all parties thereunder. To make the filing of this account by the executors of Wm. Wright, available for any practical purpose, it must be treated as equivalent to a filing by the administrator himself; and if the passing of the account is to amount to anything, it must be binding on all parties, as if filed by the administrator and passed against him. But looking at the whole scope and purvieu of the Rev. Stat. reading the bond required to be given, in connection with Sections 12, 23, and 24, we cannot think that the executors of Wm. Wright have any authority to file, or the Judge of Probates to pass, any account filed by them, as the accounts of the administrator of the estate of Frost, of his transactions with the estate in the course of his administration. The Legislature having expressly declared, that the executors of the executor should not be the representatives of the original testator, the executors of Wright have, in our opinion, no power to interfere in the administration of Frost's estate. The accounts of the administration of that estate, when passed by the Judge of Probates, are, we think, those which said administrator himself shall

render in the course of his administration. If he has failed to make and exhibit an inventory, or well and truly to administer according to law, or to make a just and true account of his administration, within the time limited, his successor in the administration, or the parties interested in the estate of the original testator are by no means remediless; they have the administration bond, and they have the Court of Equity, whose instrumentality may be invoked for obtaining and establishing an account against his estate. The bond itself evidently contemplates accounts being examined and allowed, otherwise than by the Probate Court, for it says: "The same being "first examined and allowed of by the said Probate Court, or other "Court of competent authority in that behalf, do deliver and pay "to such person as the said Court, or other competent Court, by "sentence and decree shall adjudge." It may be said that the remedy in this view in the Probate Court is defective; but it is well known, that in a great variety of cases in England, the remedy in the Ecclesiastical Court has been found insufficient and imperfect, and the necessity of the interposition of the Court of Equity abundantly shown.

The Appeal will therefore be dismissed.

PICKETT v. PERKINS.

OCTOBER 19.

The trial of a civil suit by a Justice of the Peace is an "official act", and he is entitled to notice under the Revised Statutes, cap. 129, before bringing an action against him for wrongfully proceeding in the suit.

A notice of action stated, "that you, the said E. P., (defendant), on the 23rd Dec., "1863, at the Parish of K., and County of K., and on divers other days and times, "&c., wrongfully and maliciously, and without any reasonable and probable cause, "advised and encouraged one H. P. to bring an action in your Court, before you as "a Justice of the Peace, against the plaintiff, in a matter of real estate, wherein "the title of land was and did come in question, and wherein you had no jurisdic-"tion as a Justice of the Peace, (setting out the proceedings and the award of judg-"ment against plaintiff), and that you, the said (defendant), on the day and year "last aforesaid, issued in the aforesaid case, wherein you had no jurisdiction, as "aforesaid, an execution on the said judgment against the goods and chattels "of the plaintiff, and caused his goods and chattels to be seized under such execu-"tion to satisfy the same".

Held, that the issuing of the execution was a continuation of the previous proceedings in the suit; and therefore, that the time and place of the issuing was stated with sufficient certainty in the notice.

The judgment of an inferior Court, involving a question of jurisdiction, is not conclusive; therefore a Justice of the Peace is liable in an action of trespass for issuing an execution on a judgment recovered before him, in a case in which he had no jurisdiction, because the title to land came in question, though the judgment remains unreversed.

The declaration charged the defendant, a Justice of the Peace, with wrongfully and maliciously and without any reasonable and probable cause, advising and encouraging one Horatio Pickett to bring an action against the plaintiff, in defendant's Court, in a matter in which the title of land came in question, in which defendant had no jurisdiction; and with wrongfully and maliciously issuing a summons against the plaintiff, and proceeding to try the cause without jurisdiction; and refusing to take down the evidence and plaintiff's objections; and directing the jury on the trial that the title to land did not come in question, and to find a verdict against the plaintiff; and also, with wrongfully and maliciously giving judgment against the plaintiff in the said suit, and refusing to give him a copy of the proceedings to enable him to obtain a review; and wrongfully and maliciously issuing an execution against the plaintiff's goods and chattels on the said judgment, and cauing them to be sold to satisfy the same.

At the trial before WILMOT, J., at the last King's Circuit, it was contended on behalf of the defendant: 1. That the notice of action was insufficient, inasmuch as it did not state the levy and sale of the plaintiff's horse and wagon with sufficient certainty, nor state the place where the act complained of occurred; and that the evidence of such levy and sale were consequently improperly admitted. The notice was as follows:—"For that you, the said Elijah A. Perkins, "hertofore, to-wit, on the 23rd December, 1863, at the Parish of "Kingston, and County of Kings, and on divers other days and "times, &c., wrongfully and maliciously, and without any reasonable "probable cause, and in abuse of the process of the law, advised and "encouraged one Horatio Pickett to bring an action in your Court, "before you, as Justice of the Peace, against the said Munson Gould "Pickett, (plaintiff), in a matter of real estate, wherein the title of "land was and did come in question, and wherein you had no juris-"diction as a Justice of the Peace," (setting out the proceedings, and charging defendant with a refusal to take down the evidence truly, and the objections taken at the trial, and with falsely taking down the evidence, and directing the jury that the title to land was not in question, and that they should find for the plaintiff, (Horatio Pickett), which they did; and on which defendant wronfully and maliciously gave judgment against M. G. Pickett, for damages and costs for £3 2s.; also, with refusing to give the said Munson Gould Pickett a true copy of the proceedings in order to apply for a review); "and "for that you, the said Elijah A. Perkins, to-wit, on the day and "year last aforesaid, issued and caused to be issued in the aforesaid "case, wherein you had no jurisdiction, as aforesaid, an execution on "the aforesaid judgment, against the goods and chattels of the said

"Munson G. Pickett, and caused his goods and chattels to be seized "under such execution, to satisfy the same, by means of which, said "several premises, &c." 2. That the defendant was not liable for the seizure and sale of the plaintiff's goods under the execution, because while the judgment remained unreversed it was conclusive against the plaintiff as to his liabity; defendant was bound to issue an execution upon it, and in doing so was only acting ministerially. 3. That an order of Mr. Justice Parker, dated two days after the date of the notice of action, was improperly admitted in evidence. The ruling of the learned Judge being against the defendant on these points, and a verdict having been found for the plaintiff.

S. R. Thomson, Q. C., obtained a rule *nisi* for a new trial on the above grounds, citing Martins *v.* Upcher, (3 Q. B. 662), Breeze *v.* Jardine, (4 Q. B. 585).

D. S. Kerr, Q. C., and *A. R. Wetmore*, Q. C., shewed cause in Easter Term. 1. The notice of action was clearly sufficient, for it does not require the same degree of particularity as a declaration, for its only object is to enable the magistrate to tender amends. In this case the defendant was not entitled to notice, because the words of the Statute are: "No action shall be commenced against a Justice for an official "act, until one month at least after notice." This was not an official, but a judicial act, and therefore notice was not required. The issuing of a summons is no part of the common law duty of a Justice of the Peace. This Act was copied from an English Act, where magistrates have merely a criminal jurisdiction; The Justice is, therefore, not entitled to notice in a matter of civil jurisdiction; but in this case he was acting wholly beyond his jurisdiction, and became a mere wrong doer. Assuming that a notice was necessary, the place was sufficiently stated, for it is given in the beginning of the notice, and the whole transaction was merely a continuance of the first act. Jones *v.* Nicholls, (13 M. & W. 361). It is not necessary to have a specific venue laid to every traversable fact in a notice of action. Leary *v.* Patrick, (15 Q. B. 268). 2. The evidence of what was done under the execution was properly admitted; it was but a continuation of the wrongful act of the defendant. 3. The order of Judge Parker was properly admissable, although dated after the notice, because it was part of the same transaction, and had reference to what took place before the notice was given. It could not be contended that evidence could not be given of damages which accrued after the notice of action, but were the result of the Justice's illegal act. [RITCHIE, C. J.: Would you not cut down by this the whole doctrine of tendering amends?] In any case the evidence of this order was immaterial, and cannot affect the rights of the party.

S. R. Thomson, Q.C., contra. 1. Under all the authorities it is clear, that the notice should give time and place with sufficient certainty, and this notice is defective in these particulars. 2. There being no reversal of the proceedings before the Justice, he was bound to issue execution, and he cannot be held liable for doing what he was bound in the discharge of his ministerial duty to perform. [RITCHIE, C. J.: I have never been under the impression that where there was no jurisdiction, a reversal of the proceedings required to be shewn. ALLEN, J.: Suppose a Justice without any corrupt motive gives judgment, and afterwards discovers that he had made a mistake, is he bound to issue an execution; and is he liable to an action if he refuses to do so?] Yes. I should say he would be. [RITCHIE, C. J.: I should say he would be liable to an action if he did].

Cur. adv. vult.

ALLEN, J., now delivered the judgment of the Court.

This was an action on the case against the defendant, a Justice of the Peace, charging him with wrongfully and maliciously, and without any reasonable or probable cause, advising and encouraging one Horatio Pickett to bring an action against the plaintiff, in the Court before the defendant, as a Justice of the Peace, in a matter in which the title of land came in question, and in which the defendant had no jurisdiction as a Justice of the Peace; also with wrongfully and maliciously issuing a summons against the plaintiff, and proceeding to try the cause without jurisdiction, and refusing to take down the evidence and the plaintiff's objections, and directing the jury that the title to land did not come in question, and that they should find a verdict against the plaintiff; and with wrongfully and maliciously giving judgment against the plaintiff in the said suit, and refusing to give him a copy of the proceedings, in order to enable him to apply for a review; also, with wrongfully and maliciously issuing an execution against the plaintiff's goods and chattels on the said judgment, without jurisdiction, and causing the plaintiff's goods and chattels to be seized and sold to satisfy the same.

A number of objections were taken on the motion for a new trial, most of which were disposed of at that time. The principal ground on which the rule was granted was, the alleged insufficiency of the notice of action, and the consequent improper admission of evidence of the execution and levy on the plaintiff's horse and wagon, and of the sale under the execution, such levy and sale not being stated with sufficient certainty in the notice. The notice of action was in the following form:—"For that you, the said Elijah A. Perkins, here-"tofore, to-wit on the 23rd December, 1863, at the Parish of King-

"ston and County of King's, and on divers other days and times, "&c., wrongfully and maliciously, and without any reasonable and "probable cause, and in abuse of the process of law, advised and en-"couraged one Horatio Pickett to bring an action in your Court, "before you, as Justice of the Peace, against the said Munson Gould "Pickett (plaintiff), in a matter of real estate, wherein the title of "land was and did come in question, and wherein you had no juris-"diction as a Justice of the Peace," (setting out the proceedings, and charging the defendant with a refusal to take down the evidence truly, and the objections made at the trial, and with falsely taking down the evidence, and directing the jury that the title to land was not in question, and that they should find for the plaintiff (Horatio Pickett), which they did; and on which defendant wrongfully and maliciously gave judgment against M. G. Pickett for damages and costs for £3 2s.; also with refusing to give the said Munson Gould Pickett a true copy of the proceedings in order to apply for a review); "and "for that you, the said Elijah A. Perkins, to-wit, on the day and year "last aforesaid, issued and caused to be issued in the aforesaid case, "wherein you had no jurisdiction, as aforesaid, an execution on the "aforesaid judgment, against the goods and chattels of the said Mun-"son G. Pickett, and caused his goods and chattels to be seized under "such execution, to satisfy the same, by means of which said several "premises," &c.

We think the notice is sufficiently certain, and that the issuing of the execution may be considered a continuation of the previous proceedings, described as having been taken by the defendant against the plaintiff. In Jones v. Bird (5 B. & Ald. 845), Bayley, J., says: "A notice of this sort does not require the same precision as a dec-"laration. It is quite sufficient if it calls the attention of the de-"fendant to the general nature of the injury." And Best, J., says: "The only object of the notice is to give the defendant an opportu-"nity to tender amends, and it ought not to be scanned very nicely. "Its object is at an end the moment the action is brought, and it is "only necessary to refer to it, to see whether substantially the de-"fendant has been informed of the ground of complaint. It is no "ground of nonsuit that there is a variance between the notice and "the proof." In Leary v. Patrick (15 Q. B. 268), Lord Campbell says: "It is clear that the Justice must, on reading this notice, have "known where the cause of action all arose. It cannot be necessary "to have a specific venue laid to every traversable fact in a notice of "action." In Jones v. Nicholls (13 M. & W. 364), Parke, B., says: "This notice was framed to be read by the constable, who was prob-"ably a plain man, and who, if he read it as a plain man, could have "no doubt at all that it related to one continuous transaction." That

part of the notice in the present case, which relates to the issuing of the execution, states that the defendant "issued *in the aforesaid* "*case*, wherein you had no jurisdiction, as aforesaid, an execution on "*the aforesaid judgment*," &c. What *case* and what *judgment* are here referred to? Why surely the case, and the judgment mentioned in the previous part of the notice, where time and place are stated. Can any person read this notice without being satisfied that the execution mentioned, was the execution issued upon the judgment signed against the plaintiff, stated in the previous part of the notice, and that the whole of the proceedings therein described was one continuous transaction? We cannot doubt that it fully informed the defendant of the ground of complaint against him; and to adopt the words of Lord Campbell, that he must have known where the cause of action all arose. In Martins v. Upcher (3 Q. B. 662), where the notice was held insufficient, the place where the alleged trespass was committed, was not stated in any part of the notice; but here both time and place are stated for the issuing of the summons, the trial and the judgment. We, therefore, think the cause of action was described with sufficient certainty. An objection was taken by the plaintiffs counsel, that the defendant was not entitled to notice in this case, because the trial, by a Justice of the Peace, of a civil suit, was not an "official act." The view we have taken of the notice, would render it unnecessary to decide this question, but we have no hesitation in saying, that in our opinion the statute applies as well to the proceedings of Justices in civil suits as to those performed in their character as conservators of the peace. It was only by virtue of his office of Justice of the Peace, that the defendant had authority to try civil suits; any proceeding, therefore, taken by him in such a suit, was an official act. In addition to the objections to the notice, it was contended that the defendant was not liable for the seizure and sale of the plaintiff's goods under the execution, because while the judgment remained unreversed, it was conclusive against the plaintiff as to his liability; that the defendant was bound to issue an execution upon it, and in doing so, was only acting ministerially. But there is a clear distinction between the effect of judgments of a superior and those of an inferior Court, with respect to their conclusiveness. In the late case of The Mayor of London v. Cox (Law R. 2 H. Lords Cases 262), where the question of the jurisdictou of Inferior Courts was very fully discussed, Wilkes, J., delivering the opinion of the Judges, says: "Another distinction is, that whereas "the judgment of a Superior Court unreversed, is conclusive as to "all relevant matters thereby decided, the judgment of an Inferior "Court, involving a question of jurisdiction, is not final. If the de-"cision be for the defendant, there is nothing to estop the plaintiff

"from suing over again in a Superior, and insisting that the decision "below had turned, or might have turned, upon jurisdiction. If the "decision were in favor of the plaintiff, it is still not conclusive, be-"cause the rule, that in Inferior Courts and proceedings by Magis-"trates, the maxim, *omnia præsumuntur rite esse acta*, does not "apply to give jurisdiction, never has been questioned. Per Holroyd, "J., Rex. v. All Saints, Southampton (7 B. & C. 785); Rex. v. Bolton "(1 Q. B. 66); Chew v. Holroyd (8 Exch. 249), per Parke, B., * * * "There is yet another difference worth noticing between Courts of "general and Courts of limited jurisdiction, namely, that the plain-"tiff is liable to an action for executing the process of an Inferior "Court, in a matter beyond its jurisdiction, and cannot justify under "such process, whether he knows of the defect or not; and that the "Judge and officers are liable to a civil action, if they know of the "defect of jurisdiction. Moravia v. Sloper (Willes 30); Carratt v. "Morley (1 Q. B. 18); Andrews v. Morris (1 Q. B. 3); Houlden v. "Smith (14 Q. B. 841)." In Calder v. Halket (3 Moore's P. C. C. 38), Parke, B., says: "It is well settled that a Judge of a Court of Record "in England, with limited jurisdiction, or a Justice of the Peace, act-"ing judicially, with a special and limited authority, is not liable to an "action of trespass for acting without jurisdiction, *unless he had the "knowledge or means of knowledge of which he* ought to have availed "himself, of that which constitutes the defect of jurisdiction." Apply these principles to the present case, and what do we find? The defendant issued a summons against the plaintiff; tries the suit, gives judgment, and issues execution against him, in a cause in which he (defendant) had no jurisdiction, because the title to land came in question, and which defect of jurisdiction was not only made known to him by the plaintiff's objections at the trial, but was also clearly apparent by the evidence. He had the knowledge, of which he ought to have availed himself, and should have rendered judgment for the defendant, the present plaintiff. To adopt the language of the Court, in Houlden v. Smith (14 Q. B. 852): "The facts of the "case, which were before the defendant, and could not be unknown "to him, showed that he had not jurisdiction; and his mistaking the "law as applied to these facts, cannot give him even a *prima facie* "jurisdiction, or semblance of any." The judgment, therefore, is no justification to the defendant in issuing the execution. We do not think there is anything in the objections taken to the admission in evidence of the Judges' orders, which do not seem to affect the real matter in dispute.

The rule for a new trial will, therefore, be discharged.

DESBRISAY *v.* MACKEY.

OCTOBER 16.

A writ issued by an uncertificated attorney, and all proceedings taken thereunder, will be set aside.

A. L. Palmer, Q. C., on a former day in this term, moved to set aside the writ of *capias ad respondendum*, in this case, and discharge the defendant out of custody, on the ground that when the writ was issued, and the defendant arrested, the plaintiff's attorney was prohibited from practising, by 22nd Vict. Cap. 28, in consequence of his not having, at that time, paid his dues for the benefit of the Law Library. The writ was issued 22nd June, 1867, and the defendant was arrested on the 24th June. The attorney did not take out his certificate until July 6th. He contended that under the Act, an attorney was absolutely prohibited from practising after Trinity Term, if the sum was not paid, and in this respect it differed from the English enactments, which seem to contemplate the attorney practising, but subject him to a penalty. The words of the Act must be taken in all their force, and they were plainly prohibitory.

Fraser, contra. The authorities show that the interests of the innocent suitor will be protected, even if the attorney has been guilty of neglect. Sparling *v.* Brereton, (2 Law Rep. 64). [RITCHIE, C. J. In the absence of any decision would it occur to one that stronger words than those of the statute could be used?] The English Act is quite as strong. [RITCHIE, C. J. In the English Act you will find that a penalty is imposed]. It has been held to be no objection to bail, that they had been put in by an uncertificated attorney. Anon. (2 Chitty 98); Glynn *v.* Hutchinson, (2 A. & E. 660).

Cur. adv. vult.

ALLEN, J., now delivered the judgment of the Court.

This was an application to set aside the writ of *capias ad respondendum* in this case, and to discharge the defendant out of custody, on the ground that at the time of issuing the writ and arresting the defendant, the plaintiff's attorney was prohibited from practising, by the Act 22 Vict., cap. 28, intituled "An Act relating to the Law "Library." The first section of this Act declares that every attorney of the Supreme Court, on or before the first day of Trinity Term in each year, shall pay to the Clerk of the Pleas the sum of fifteen shillings for the purpose of providing for and maintaining the Law Library. Sect. 3 enacts that "no attorney shall be allowed to prac-"tice in the Supreme Conrt, after the first day of Trinity Term in "each year, unless such payment is made; but an attorney who has "neglected to make the payment on or before the first day of Trinity

"may do so at any time thereafter, for the purpose of enabling him "to resume his practice." Trinity Term commenced the 11th June. The writ was issued on the 22nd. and the defendant was arrested on the 24th June: the payment of the fifteen shillings required by the Act, was not made until the 5th July. If no decisions had been made in England upon the several Acts of Parliament, requiring attorneys to take out annual certificates, we should have thought the language of the Act of Assembly too clear to admit of any doubts, but we wished to refer to the English statutes to ascertain how far they differed from our Act, and whether, in case of difference, the English decisions would apply here. The only English statutes which it is necessary to refer to, are: 37 Geo. 3, c. 90; 6 and 7 Vict., c. 73; and 23 and 24 Vict., c. 127. The 30th Sect. of the first mentioned Act declares, that if any person shall sue out any writ, &c., or carry on any proceeding in any Court, without obtaining a certificate in the manner directed, he shall forfeit and pay £50 for every offence, "and shall be incapable to prosecute any action or "suit in any Court for the recovering any fee, reward or disburse-"ment on account of prosecuting, carrying on or defending any ac-"tion, &c., or having prosecuted, carried on or defended any action, "&c., or any matter or thing relating thereto, without such certifi-"cate." The Act 6 and 7 Vict., c. 73, repeals so much of the 37 Geo. 3, c. 90, as declares the admission of an attorney who shall neglect to obtain his certificate for a year, to be void; and enacts by section 2, that no person shall act as an attorney or solicitor, or as such sue out any writ or process, or commence, carry on or defend any action, suit or other proceeding in any of the Courts, unless such person shall be admitted and enrolled and otherwise duly qualified to act as an attorney or solicitor, pursuant to the directions of the Act, and shall continue to be so duly qualified, and on the roll at the time of his acting. The 26th section enacts, "That no person who as an "attorney or solicitor, shall sue, prosecute, defend or carry on any "action or suit, or any proceedings in any of the Courts, without "having previously obtained a stamped certificate which shall be "then in force, shall be capable of maintaining any action or suit at "law or in equity, for the recovery of any fee, reward or disburse-"ment, for or in respect of any business, matter or thing done by "him as an attorney or solicitor as aforesaid, whilst he shall have "been without such certificate." The 23 and 24 Vict., c. 127, in amendment of the 6 and 7 Vict., c. 73, enacts, in Sect. 26, that "Every person who acts as an attorney or solicitor contrary to the "enactment in Sect. 2 of the first hereinafter mentioned Act, (6 and "7 Vict., c. 73), without being duly qualified so to act, shall be deemed "guilty of a contempt of the Court in which the action, suit, cause,

"matter or proceeding, in relation to which he so acts, is brought, had "or taken, and may be punished accordingly, and shall be incapable "of maintaining any action or suit for any fee or reward, for or in "respect of anything done, or any disbursement made by him in the "course of so acting, and shall, in addition to any other penalty or "forfeiture, and to any disability to which he may be subject, forfeit "and pay for each offence, the sum of fifty pounds, to be recovered." &c. The construction given to these statutes is, that "the neglect "of the attorney to take out his certificate, will not prejudice the "proceedings in the suit, so as to injure the client." Chit. Arch., 8th ed., 51; Tidd's Pr., 73; 2 Chit. Gen. Pr. 16. "The reason for this," says Best, C. J., in Reeder v. Broom (3 Bing. 10), "is, that the statutes "show that the Legislature never intended to touch the suitor, *be-* "*cause all the punishment they inflict is directed against the attorney,* "who, if he practices without a regular title, is disabled to sue for "his costs." In Smith v. Wilson (1 Dowl. 545), it was held that a judgment signed by an uncertificated attorney was not irregular; so, bail may be put in by an uncertificated attorney. Anon. 2 Chit. R. 98. In Welch v. Pribble (1 D. & Ry. 215), it was held to be no ground for cancelling a bail bond, that the attorney who sued out the writ had not taken out his certificate, Bayley, J., saying that the interests of the client were not to suffer by the negligence of the attorney. Hilleary v. Hungate (3 Dowl. 56), and Glynn v. Hutchinson (3 Dowl. 529), were decided on the same principle. The only case we have found where a different rule was adopted, is Patterson v. Powell (9 Bing. 620), where a notice of trial, given by an attorney who had omitted to take out his certificate, was set aside as irregular. The Court said, "the notice was signed by one who had not "taken out his certificate, and therefore was not entitled to practice "at all." None of the authorities appear to have been cited in this case. Under the Stat. 6 and 7 Vict., c. 73, it has been held that an uncertificated attorney may be a good attesting witness to a warrant of attorney. Holdgate v. Slight (9 Law & Eq. R. 331). Erle, J., in giving judgment, says: "The Statute 6 and 7 Vict., c. 73, § 2, enacts "that no person shall act as an attorney unless admitted and enrolled, "and otherwise duly qualified. Admission and enrollment are con- "sidered conditions precedent to the power of acting as an attorney. "But when we come to Sect. 26, the clause relating to the effect of "the want of a certificate, we find the provision that no person who "as an attorney shall sue, prosecute or carry on any action, suit or "other proceeding, without having previously obtained a stamped "certificate, shall be capable of maintaining any action for his fees "for carrying on such business. It seems to me, therefore, that an "attorney, though uncertificated, may do acts in his capacity of at-

"torney, which shall be valid, but that the result will be that he "will in such case lose his fees." Under the prohibitory clause in Sect. 2 of the last mentioned Act, it has been held that an unqualified person acting as an attorney, is liable to an indictment. Reg v. Buchanan (8 Q. B. 883). The last case we shall refer to is Sterling v. Brereton (Law R. 2 Equity, c. 64; 12 Jur. N. S. 330), where V. C. Wood, acting upon the authority of Holgate v. Slight *(supra)* refused to set aside, as irregular, the proceedings of an uncertificated solicitor, holding, that as against third parties his acts were valid and binding upon the client on whose behalf they were done. All the above cases seem to turn upon the provisions in the several Acts, that an attorney shall not recover any fees for any business done while he is uncertificated; and if the Act 22 Vict., c. 28, contained such a clause, we should probably feel bound to put the same construction on it as has been given to the English Statutes. But considering the different language used in the Act of Assembly, we do not feel ourselves warranted in putting a construction upon it, which, in our opinion, the plain and ordinary meaning of the words will not bear. If the English Statutes had used prohibitory words only against unqualified attorneys practising, it may well be doubted whether they would have received the construction that has been given them; but when they declare in addition that an attorney shall not recover any fees for prosecuting or defending actions while he is uncertificated, it seems to imply that the Legislature did not intend that the proceedings themselves should be irregular, but, as said by Best, C. J., that they intended to inflict all the punishment of the neglect upon the attorney. We have not overlooked the hardship that, by our construction of the Act, may result to the client from the employment of an unqualified attorney, of whose neglect he may be entirely ignorant; but the hardship is not greater than happens in every case where proceedings are set aside in consequence of a mistake of the attorney in omitting to comply with some rule of practice. The inconvenience of the construction, however, is no reason for departing from the plain meaning of the words of an Act. In Abbey v. Dale (11 Com. B. 391), Jervis, C. J., delivering the judgment of the Court, says: "If the precise words used are plain and un-"ambiguous in our judgment, we are bound to construe them in their "ordinary sense, even though it do lead, in our view of the case, to "an absurdity or manifest injustice. Words may be modified or "varied, where their import is doubtful or obscure. But we cannot "depart from the ordinary meaning of the precise words used, merely "because we see, or fancy we see, an absurdity or manifest injustice "from an adherence to their literal meaning." "It is the duty of all "courts (says Tindal, C. J., in Everett and Mills, 4 Scott's, N. C. 531),

"to confine themselves to the words of the Legislature: nothing add-
"ing thereto, nothing diminishing." In Rex. v. St. Pancras (6 A. &
"E. 7), Coleridge, J., says: "It is, in my opinion, so important for the
"Court in constructing modern Statutes, to act upon the principle of
"giving full effect to their language, and of declining to mould that
"language in or to meet either an alleged convenience, or an alleged
"equity, upon doubtful evidence of intention, that nothing will in-
"duce me to withdraw a case from the operation of a section which
"is within its words, but clear and unambiguous evidence that so to
"do is to fulfil the general intent of the Statute, and also, that to ad-
"here to the literal interpretation is to decide inconsistently with
"other and overruling provisions of the same Statute." Now what can be plainer and more unambiguous than the words of the section under considaration? "No attorney shall be allowed to practice after the first day of Trinity Term in each year, unless such payment is made." Is not the payment a condition precedent to his right to practice; and is not his practising without such payment in direct defiance of the clear and positive words of the Act? His doing so is an illegal act, which, according to the case of Reg. v. Buchanan *(supra)*, would render him liable to an indictment. If we had any doubt about the meaning of the words just quoted, we think such doubt would be removed by the concluding words of the section, which declare, that an attorney who has neglected to pay before the first day of Trinity Term, may do so afterwards "for the purpose of enabling him to *resume* his practice." To resume is thus defined in the Imperial Dictionary—"To take up again after interruption; to *begin again*. If the only effect of the Act was to make an attorney who had not paid liable for an attachment for contempt, the concluding words of the section would have no meaning, because there would have been no interruption of his practice. Nothing to *resume*. We can only construe the Act as a declaration of the Legislature that an attorney who had not paid the fifteen shillings on the first day of Trinity Term, should cease to practice until he did pay, and that his practising while so in default was illegal, and his proceedings consequently irregular. No other construction will give effect to the words of the Act, and we cannot speculate upon the intention of the Legislature. For this reason, we think the writ must be set aside and the bail bond delivered up to be cancelled; but as this is the first time any question has arisen under the Act, and the non-payment seems not to have been intentional, the rule will be granted without costs. This indulgence must not, however, be considered as a precedent for future cases.

Rule to set aside the proceedings without costs.

Doe dem. SHORE *v.* GEARON.

OCTOBER 16.

The Probate Court has jurisdiction to grant administration, without a citation on the estate of a person dying in the Province, on the petition of a person alleging himself to be a creditor of the deceased, and that he died without leaving any next of kin.

If administration is irregularly granted, application should be made to the Probate Court to revoke it.

Ejectment tried before WELDON, J., at the York sittings in January last. It appeared in evidence that John E. Woolford, deceased, was the lessee of a certain property, the *locus in quo* under a lease for twenty-one years, containing a covenant for renewal, which lease had expired some five years prior to his death, and that he continued to hold until his death under the terms of the original lease. He died intestate, leaving no heirs. A few days before his death he stated that he intended to give the property to his servant, one Charles Mills. Letters of administration were issued by the Judge of Probates for York County, to John Edwards, as a creditor, without citation, and he, as administrator, released to the lessor of the plaintiff, who was the owner of the fee. Mills remained in possession several months after Woolford's death, and then conveyed all his right to the defendant, who took possession.

The learned Judge directed the jury to find for the defendant, on the ground that there was no consideration for the release from Edwards to the lessor of the plaintiff. It having appeared in the plaintiff's case, that by an understanding between Edwards and the lessor of the plaintiff, a note given as the consideration in the release was not to be paid until the defendant was put out of possession. Verdict for defendant.

G. F. Gregory, in Hilary Term last, obtained a rule *nisi* for a new trial, upon the grounds of misdirection, and that the verdict was contrary to evidence.

G. Botsford shewed cause in Trinity Term. 1. There was evidence for the jury to find that the lessor of the plaintiff had admitted the defendant's tenancy, and therefore a notice to quit was necessary to sustain the action. 2. There was no jurisdiction in the Probate Court, the property of the deceased having been proved by the petition itself, as well as by evidence, to belong to the Crown; there was no authority in that Court to grant probate without express consent from the Crown. The first Section of the Act 1 Rev. Stat. 350, confining the power of the Court to grant administration to the manner hitherto in use, the following portions of the Act directing who should be entitled to such probate, did not entitle a creditor of deceased to administration of property belonging to the Crown.

That for the purposes of the Probate jurisdiction there were in fact no assts at all, the property belonging to the Crown. 3. That by the petition to the Court of Probates, as well as by the evidence at the trial, it was clearly proved that Edwards was not a creditor at all of the deceased, therefore the Court was without jurisdiction. Chit, Pra. 259; 2 Dent. 270; 2 B. & Al. 258; Rex. v. Lord Yarborough, (4 Mad. 321); Man. Exch. Pra. 142, 234; 2 Chit. Gen. Pra. 453; Migit v. Johnston, (2 Doug. 547); Cave v Roberts, (8 Sim. 216); Bull. N. P. 246–7; 1 Wil. Ex. 350, 384, 387; 4 Drew 269; Dyke v. Walford, (5 Moo. P. C. 494).

A. G. Blair contra. The misdirection is clear; the surrender was given in consideration of the £50 therein stated. It is a matter between the Probate Court and the administrator only, if the latter does not exact payment. The lessor of the plaintiff never recognized defendant as tenant; no act is shewn on her part amounting to a recognition. The validity of letters of admidistration cannot be inquired into by this Court. Doe. dem. Gaton v. Thompson, (4 Allen 490). [RITCHIE, C. J.: The Probate Court has control over the estate of every person dying intestate and may grant letters of administration therein where there are assets in the County. 1 Rev. Stat., Tit. 36, § 7 and 8]. Edwards is shewn to be a creditor, and comes within the Act. The Probate Court being a Court of competent authority, its acts cannot be impugned so long as it is shewn to have jurisdiction.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

The land in dispute was originally granted on the 18th July, 1800, to the Governor and trustees of the College of New Brunswick. A deed from the Governor and trustees to John Saunders, the late Chief Justice, dated 17th March, 1826, was in evidence, but was not received as a registered deed, the learned Judge being of opinion that it had not been properly acknowledged. The late John Saunders died intestate, leaving the Hon. John S. Saunders, the lessor of the plaintiff, Mrs. Shore, and Geo. S. Flood, son of his deceased daughter, Eliza Flood, him surviving. It was proved by Mr. John S. Saunders that Geo. Shore was in possession of the *locus in quo* in 1817 or 1818, and cut down the trees on the place, and continued in possession until 1820, when Mr. Saunders left the Province, leaving him in possession. A registered deed was produced from John S. Saunders and wife and George S. Flood to George Shore and his wife, the lessor of the plaintiff, dated 8th August, 1844. A lease was in evidence from George Shore and wife to John E. Woolford, dated 11th

March, 1842, for twenty-one years, at £5 a year, renewable for further term as might be agreed on unless improvements paid for. It was proved that Woolford was in possession from 1830 to the time of his death, and during that time paid rent to Mr. and Mrs. Shore during the lifetime of Mr. Shore, and after his dearh to Mrs. Shore under the lease, till the time of the lessee's death, which took place in January, 1866. The lease does not appear to have been renewed or the improvements paid for, but Woolford continued to live on the premises and pay the rent to Mrs. Shore as he had done under the lease. Administration of Woolford's estate was granted to John Edwards, 16th January, 1866. The administration appears to have been granted to Edwards, as a creditor of Woolford, without any citation to Woolford's heirs or next of kin. A release or assignment was proved from John Edwards, as administrator of John Woolford, to Mrs. Shore of the lease to Woolford on the 19th May, and registered on the 29th May, 1866, in consideration of £50, which amount appears not to have been paid, but a note given, the money not to be paid till she got the property. Woolford was a widower, and had a servant, one Charles Mills, who lived with him some twenty-four years, and was living with him in the house on the premises at the time of his death. The only way in which defendant appears connected with the property is through Mills, by virtue of a deed from Mills to him, dated 23rd May, 1866, and registered 31st May, 1866. The only shadow of claim Mills would, from the evidence, appear to have in the property arose from the fact of his being Woolford's servant, and as such living on the premises with him and up to and at the time of his death, and continuing there afterwards till he handed the possession to the defendant, and from Woolford's having, just before his death, stated that he would give the property to Mills; that he wished him to have the property; and that he would make a will, which, however, he never did. It was urged that if Gearon had no title to the property through Mills, he had established a tenancy between himself and Mrs. Shore. The only evidence to maintain this, is the account as given by defendant of what took place between himself and Mrs. Shore with reference to the property. We take his words from the learned Judge's notes: "After I was served with process I went to Mrs. Shore, and said I "was sued, and that I thought she would have no objection to me if "I paid the yearly rent of £5. I had always understood she did not "care who had it, if she got her rent. She said, 'O yes, John, but "we have taken a different view of it.' Says I, 'If you think hard "of it, I had rather give £2 more for it. She said she had 'promised "it,—in place of £5 she could get £16 or £17.'" Possession of the premises was demanded on the 1st May, 1866.

A plainer case of title in plaintiff and a clearer case of the absence of all right or title in defendant, can hardly be conceived. On the trial it was contended: 1. That there was no evidence nor examination before the surrogate, to show that the administrator was a creditor, or had any right to the administration. 2. That the petition for administration shewing that intestate had no next of kin within the Province, the power of Judge of Probate ceased. 3. That the administration bond was not taken in accordance with the practice of the Court. 4. Probate Court had no jurisdiction where there is no next of kin. 5. No authority in Court to grant administration in the absence of next of kin without special license from the Crown, and if granted, such administration is void. 6. That without the deed plaintiff could not recover. The jury having found for the defendant. The points urged at the trial were relied on as an answer to the action, and further that the jury found there was a tenancy from year to year between Mrs. Shore and Woolford, which she affirmed afterwards in the defendant, in other words, that they found a tenancy from year to year existing between Mrs. Shore and the defendant. All we can say is, if they did so find there was not a scintilla of evidence to warrant such a finding. As to the questions raised, they are, in our opinion, easily answered. The Rev. Stat., cap. 136, § 7, enacts "that any deceased person being an inhabitant "of any County and dying at any place, or not being an inhabitant "of this Province, having assets in any County thereof, the Judge of "Probates of such County may take probate or grant administration, "and shall in either case have exclusive jurisdiction over all the "estate of such deceased person in the Province," and by Sect. 8, The application to the Judge of Probates for letters testamentary or for administration, shall be, by petition of the party entitled by law, or of one or more of the creditors of the decased, setting forth the time and place of the death of the deceased, and the amount of his estate, real and personal, and such other particulars as may be necessary, the same to be verified on oath before such Judge, and he may examine any other person upon oath relating to the allegations of the petition. If the "petition be opposed, or there appear to be "parties having prior or equal rights to such administration, not "assenting, or the claim thereto be doubtful, a citation shall issue. "Before granting letters of administration, the Judge of Probates "shall take from the person applying therefor a bond with two "sureties, to be approved by him, according to the form in the sche-"dule, or to the like effect, which shall be filed in the Registry of the "Court." Administration in this case appears to have been granted in due course to a creditor, neither the next of kin, if any, of the intestate, nor the Crown, if there were no next of kin, (which in the

argument appears to have been assumed, but without evidence to support such an assumption), appear to have opposed the petition. Nor is the defendant in any way connected with, nor does he claim under the one or the other. Had the Judge deemed it necessary, he would no doubt have examined other persons upon oath relating to the allegations of the petition; or if the petition had been opposed, or had there appeared to be parties having prior or equal rights to administration not assenting, or had the claim thereto been doubtful, there is nothing to lead to the supposition that a citation would not have been duly issued. It is sufficient, however, for us to see that the Judge had jurisdiction, which under the facts as proved at the trial, he appears most clearly to have had. If there has been any irregularity in the granting of the letters of administration, which we by no means desire to intimate in this case, the Probate Court, on the application of a party interested in the estate, is the proper tribunal to make the correction. The granting letters of administration is the judicial act of a Court of competent authority, and when it has jurisdiction, the sentence, so long as it stands unrepealed, must prevail, no evidence being receivable to impeach it. It is quite clear that the present defendant, showing no right, title or interest, in the property, cannot intermeddle with the estate and hold against the administrator or his assignees, the letters of administration remaining unrevoked.

Rule absolute. (*a*)

(*a*) ALLEN, J., took no part in this case.

ALLAN *v.* FERGUSON AND WHITE.

OCTOBER 16.

A., the owner of timber in possession of the Fredericton Boom Company, for the purpose of being rafted, agreed verbally to transfer it to the plaintiff, to be sold to pay certain creditors of A., and gave the plaintiff a written order upon the agent of the Boom Company, to deliver to the plaintiff all the lumber in the boom belonging to A. of certain marks. When the order was presented, the Secretary of the Company said it would be all right; but no transfer was made in the books of the Company, nor any delivery of the timber to the plaintiff, nor any dealing with it by him.

Held, that no property passed to the plaintiff, and that the timber was liable to an execution subsequently issued against A. [Per WELDON, J.]

This was an action, tried at the last Sunbury Circuit, against the defendants for seizing goods under an execution against W. F. Dibblee, the plaintiff alleging they had been transferred to him on cer-

tain trusts prior to the writ of *fiere facias* being placed in the Sheriff's hands. From the evidence it appeared that on the 3rd July, 1861, Dibblee had, in the boom of the Fredericton Boom Company, a quantity of logs and other lumber, which they had taken into their charge under the powers contained in their Act of Incorporation, Dibblee having furnished his marks agreeably to the Act to enable them to do so, and to make the Boom Company chargeable therefor. The company kept an office at Lincoln, near the boom. Upon receiving the marks of lumber from the owner, they collect it into the boom, and raft it into joints fit to be carried to St. John. Dibblee being in embarrassed circumstances, and desirous of securing some of his creditors, who had endorsed notes for him, and had advanced money to him, and fearing that Ferguson would have an execution shortly against him, met the plaintiff at Fredericton, and proposed that he should take a transfer of what lumber Dibblee had in the Fredericton boom, to pay these claims. It was to go to Edwin Fisher, St. John, and be by him disposed of. The plaintiff agreed to accept the transfer and carry out Dibblee's wishes. On the 3rd July, the plaintiff and Dibblee went to the office of the Secretary of the Boom Company, at Lincoln, and looked over the books, and Dibblee wrote the following order and handed it to the Secretary:—

"LINCOLN, July 3rd, 1861.

"The agent of the Fredericton Boom Company will deliver to order of J. T. Allan, all lumber belonging to me in said Boom of the different marks rendered by me, of the date of 8th, 15th and 16th May last, and oblige. W. F. DIBBLEE."

Some conversation took place between the Secretary and Dibblee, and the Secretary said it would be all right, and the plaintiff accepted his declaration. The quantity of lumber was not known: it was considered all that Dibblee had in the boom. There was no entry made in the books of the company, nor any delivery, symbolical or otherwise, nor any dealing with the lumber by the plaintiff; after he heard of the levy, he forbid the Sheriff selling. The lumber was rafted by the Boom Company and was to be delivered to Duncan Glazier, for the purpose of taking to St. John, to be delivered to E. Fisher. The plaintiff paid the professed liabilities of Dibblee as funds came to his hands. The execution of Ferguson *v.* Dibblee was placed in the Sheriff's hands on the 29th July and a levy made the same day; but the lumber was not sold until the 15th September, when the same was all rafted. There was no distinct evidence, fixing the time when Glazier took charge of it from the Boom Oompany. Glazier was a witness, but did not state when, only that he took the lumber down to St. John after the sale by the Sheriff. Upon the statement of facts, the learned Judge directed the jury that the paper of the 3rd

July, made by Dibblee and handed to the Boom Company, did not, in law, convey the property to Allan, unless accompanied by a delivery or an acceptance of the property by some act of the plaintiff, and left it to the jury to say whether there was an acceptance. The jury, under this direction, found a verdict for the plaintiff.

S. R. Thomson, Q. C., in Hilary Term last, obtained a rule *nisi* for a new trial, on the grounds: 1. Misdirection, in leaving the question to the jury, whether any act was done by the company amounting to delivery to Glazier for plaintiff, there being no evidence to warrant it, the order itself not being such a one as would pass property under the Statute of frauds, and no delivery being shewn under it, symbolical or otherwise. 2. That the order to transfer the property was not an agreement under the Statute, as it did not contain the whole agreement as to the trusts. Holmes *v.* Hoskins (9 Ex. 753).

A. R. Wetmore, Q. C., shewed cause in Trinity Term, contending that there was sufficient evidence of a delivery under the order, to justify the learned Judge in leaving the question of whether there was a delivery or not, to the jury. Castle *v.* Sworder (6 H. & N. 828). 2. There is no fraud shewn in this case, such as would warrant the Court in disturbing the verdict.

S. R. Thomson, Q. C., contra. 1. To make this order good under the Statute of frauds, delivery and acceptance must be shewn, and there being no evidence of these requisites the misdirection is clear. 2. The agreement is entirely inoperative, unless it contains the whole terms of the bargain relative to the trusts. Where a portion of a contract is void, the whole is void. Bailey *v.* Fitzmaurice (8 E. & B. 664).

WELDON, J., now delivered judgment. (*a*)

A rule *nisi* was obtained for a new trial on the ground of misdirection, in leaving to the jury whether any act was done amounting to delivery by the company to Glazier; that there was no evidence to warrant this question to be left to the jury, it being only an order to deliver, unaccompanied by a delivery, symbolical or otherwise, and no property passed by the Statute of frauds. 2. That the order to transfer the property did not contain the whole agreement as to the trusts, and therefore was void by the Statute of frauds. The direction to the jury was right, if there was evidence to be left to the jury as to a constructive dealing. The case of Castle *v.* Sworder (6 H. & N. 832), is a leading case upon the subject of constructive

(*a*) The rest of the bench, being connected with the parties in this case, took no part.

delivery, acceptance, and dealing with goods, and what is proper evidence for the Judge to leave to the jury. In that case the goods were appropriated in the warehouse and described by certain marks —an invoice of goods—a transfer made in the warehouse books, and after that entry the seller ceased to have any power of getting the goods, and only the buyer could get them; and he having dealt with them by offering them for sale, was deemed proper evidence to be submitted to the jury. In the case now under consideration, there was no transfer made on the books of the Boom Company, or any evidence that Dibblee had ceased to have the power of getting the lumber from the Boom Company, or that the plaintiff had in any way dealt with the lumber; the plaintiff took it for granted that Dibblee and the Secretary of the Boom Company would make it all right. For these reasons, I should say there ought to be a new trial. I certainly failed to tell the jury, with sufficient precision, that certain acts were necessary to show a delivery, actual or constructive, by the Boom Company to Glazier for the plaintiff to enable him to recover. I find the evidence insufficient for this purpose, and therefore the rule must be absolute on this ground. I offer no opinion on the question regarding the order to transfer not containing the whole agreement in regard to the trusts, and that it was therefore void by the Statute of frauds. It is not necessary to give any opinion upon that question at present, but I conceive it is one of considerable nicety. The rule for a new trial will, therefore, be made absolute, and the costs of the trial will be costs in this cause.

RANNEY v. GREGORY.

OCTOBER 16.

Policies of insurance effected by a broker, declared that preliminary proof and evidence of the loss were to be given to the broker, and payment of losses to be made within sixty days thereafter. The practice of the broker was to receive the premiums in money or notes, crediting the underwriters with the amount, whether actually paid or not, the assured being liable to him alone for the premium. Proofs of losses were furnished to the broker from time to time, and on being satisfied of their correctness, he paid the amounts, and the policies were cancelled. Half yearly accounts were furnished by the broker to the underwriter, containing full particulars of all the risks, premiums, losses and charges, to which he made no objection until the account was rendered shewing the balance claimed in this action.

Held, in an action against the underwriter to recover the amount paid by the broker for losses, that the jury were warranted in inferring that the defendant had authorized the broker to decide upon the proof of loss in each case, and had assented to his decision.

Held, also, that the plaintiff could recover from the defendant the amount of premium of a reinsurance effected for him without proof of actual payment to the underwriter.

This was an action by the plaintiff, an insurance broker, to recover from the defendant money paid for losses upon policies of insurance underwritten by the defendant and for a premium upon a policy for reinsurance, effected for the defendant.

At the trial before WELDON, J., at the St. John Circuit in January last, it appeared that in April, 1863, the defendant authorized N. S. Demill, who was an underwriter for the plaintiff, and had been so for some time, to underwrite on all marine risks offered to him by the plaintiff to the amount of $400, on any risk. In pursuance of this authority, Demill signed policies on behalf of the defendant until his death, in October, 1864. By the terms of the policies, all preliminary proofs and evidence of loss were to be lodged with the broker, and payment of loss to be made in sixty days thereafter—premium note, if unpaid, to be deducted from the loss. The usuage of the broker was to procure the signature of the underwriters to the policies, deliver the same to the assured and receive from him the premium: if over a certain sum, three, four, and six months' credit was given on the assured's note with an indorser, or interest deducted, if cash was paid, instead of credit. If a loss occurred—the assured delivered, at the broker's office, the preliminary proofs and papers—and if found correct, the loss was paid by the broker, and charged to the respective underwriters on the policy. In case the broker had not funds from earned premiums in hand to pay losses, he paid the amount, and took it from premiums subsequently earned, or debited the underwriter with it. Each underwriter had a book, in which was kept a list of all risks, underwritten by him. He either kept the book himself, or the broker kept it for him, and delivered it to him when called for. Semi-annual accounts of all risks, premiums, loss of vessels, or partial losses as far as known, return premiums or discount for prompt payment, were made up to the 30th June and 31st December, in each year, for the respective underwriters; and at the end of each year, an annual account, showing the premiums, losses, return premiums, discounts and broker's commissions, was delivered to the several underwriters. It was proved that these accounts had been furnished by the plaintiff to the defendant. They were called for under notice, and all produced but one, from 1st July to 31st December, 1864, of which secondary evidence was admitted. The premiums of insurance were received by the broker in money or notes, he crediting each underwriter with the amount, whether he received the money or not. The underwriter looked to the broker, and the broker to the assured. The preliminary proofs of parties sustaining losses, under the respective policies underwritten by the defendant with others, were left at the office of the broker, and he finding them correct, paid the losses. These papers

were tendered in evidence by the plaintiff, and admitted by the defendant, but it was contended that they did not contain all the requisites required by the policy, to show the defendant's liability for the loss paid by the plaintiff; but the learned Judge was of opinion that preliminary proofs, as stated in the policy, only required reasonable information to be given to the underwriters, so that they might form some estimate of their rights before they were obliged to pay, and this need be only general evidence of reasonable presumption of loss, but not legal evidence as required by a Court of law. Evidence was then given that papers and documents purporting to be preliminary proofs under the respective policies for loss, were left at the broker's office, and were satisfactory to the plaintiff as such broker, and that he paid the losses, the assured cancelling the policies so underwritten by the defendant, and these policies were produced in evidence. Evidence of the general usage of brokers in such cases was not given. The learned Judge directed the jury, that to enable the plaintiff to recover for money paid for losses on policies underwritten by the defendant, in excess of the premiums, they must be satisfied that the money was paid according to the usage of the broker, and by the authority of the defendant expressed, or implied from the course of these dealings; that the plaintiff was the agent of the defendant, and that the defendant had, by his conduct, constituted the plaintiff such either expressly or by implication. As to the premium for the reinsurance of the defendant's outstanding risks, the learned Judge directed the jury that the defendant was liable to the broker for the amount; and that the underwriters on that policy were liable to make good any loss to the defendant thereon. A verdict having been found for the plaintiff.

A. R. Wetmore, Q. C., in Hilary Term last, obtained a rule *nisi* for a new trial, on the grounds: 1. That there was no general usage of brokers shewn, and that the plaintiff ought to have shewn that the preliminary proof, upon which he acted, was such as to render the defendant liable to pay under the terms of each policy respectively. 2. The plaintiff should have shewn that he paid the premium on the policy of reinsurance in money.

S. R. Thomson, Q. C., shewed cause in Easter Term. 1. The general usage of brokers does not require to be shewn in this case; it is sufficient to prove the general course of dealing between the parties. We proved by a number of witnesses, that it was the custom of that office for the broker to pay the loss, unless in case of doubt, or where expressly forbidden by the underwriter. This question was left to the jury, and the proof of the custom of the office, and of the poli-

cies being paid, is sufficient to show the liability of the defendant. 2. The premium note for the reinsurance must be considered as money paid and can be recovered as such. Defendant having authorized the plaintiff to reinsure, it is not for him to allege that the money has not been paid.

A. R. Wetmore, Q. C., contra. Before any legal liability to pay the losses, could arise, preliminary proof in each case should be filed in the broker's office. The same proof that was necessary to authorize the broker to pay the money, should have been put in evidence. This has not be done, and it has not been shewn that the money was not paid by the plaintiff without proper authority, or that he is entitled to recover it from the defendant. No general usage of brokers was shewn, and the plaintiff was not entitled to prove the custom of his office, unless it was shewn that the defendant knew it. In regard to the amount of the premium for re-insurance, it is clear that if the plaintiff did not pay the amount, he cannot recover it from defendant.

Cur. adv. vult.

WILMOT, J., now delivered the judgment of the Court.

A new trial was moved for on the ground that there was no general usage of brokers shewn; that the plaintiff ought to have shewn that the preliminary proof, upon which he acted, was such as to render the defendant liable to pay under the terms of the respective policies; and that the plaintiff should have shewn he had paid the premium in money, on the policy for re-insurance. As to the first point, we are of opinion that the general usage of brokers should not control this case, and it was properly held by the learned Judge, that the case should rest on the course of dealing, and the usage between the parties themselves. The rendering of his account by the plaintiff to the defendant, from time to time, containing full information as to the risks, premiums and losses, and no objection having ever been made by the defendant, until called upon for the payment of the balance now sought to be recovered, we think the jury was warranted in coming to the conclusion, that the defendant had assented to, and approved of the course pursued by the plaintiff. Scott *v.* Irving, (1 B. & Ad. 612). In this case the plaintiff, as the defendant's broker, must be taken to have been authorized to decide upon the preliminary proof in each case; whether the assured was entitled to payment; and as the same preliminary proof would be required to be laid before other brokers and underwriters, it would be unreasonable to hold that its production would be necessary in every action by a broker, like the present. Looking at all the circumstances of

this case, the broker must be presumed to have been invested with full authority by the defendant to adjudicate in each case, and to act accordingly. As to the premium on re-insurance, it is legally recoverable. In England the premium on a marine policy is due from the assured to the broker, and from the latter to the underwriter. The broker has his action against the assured for the premium, and the underwriter against the broker. Marsh. Ins. 239. In making up their verdict, the jury disallowed all charges in cases where policies and preliminary proofs had not been laid before the plaintiff, and we are therefore of opinion that the verdict should stand, and the rule for a new trial will be discharged.

PICKETT *v.* PICKETT.

OCTOBER 16.

A, by will executed in 1824, devised lot No. 11 to his son G., except one hundred acres, which he gave to other children, and he likewise gave to his son D. the privilege of keeping a saw-mill where it then stood, with a log and lumber yard, without molestation or hindrance; but not to dispose of the said mill privilege to any person except his brother G. or his liberty; and all the remainder of the said lot No. 11, to remain to his son G., with the above exception. G. died in 1840, having devised all his property to his sons, one of whom was the plaintiff. The plaintiff's property was escheated in 1852, and partition made between the Crown and the other heirs of G., by which the saw-mill, with the log and lumber yard adjoining, and the privilege of water for the use of the mill, were awarded to D., to hold according to the will of A. The Crown afterwards granted its portion of the land to the plaintiff, excepting the saw-mill, with the log and lumber yard adjoining, and the use of the water for the mill, as awarded to D. in the partition. D. died in 1861, and devised the saw-mill and privilege to the defendant. The plaintiff had a fulling-mill on the land granted to him by the Crown. The fulling-mill and saw-mill were supplied with water by the same aqueduct. Both mills could not be worked at the same time, and when the fulling-mill was in operation, the water was diverted from the saw-mill by an opening in the aqueduct.

Held, in trespass for taking possession of the saw-mill, injuring the gates and diverting the water from the fulling-mill: 1. That if the will of A. gave D. only a life estate in the saw-mill, the plaintiff had no right, as any interest he might have had as one of the heirs of A. was escheated to the Crown, and excepted out of the grant to him. 2. That in such case the defendant, as one of the heirs of A., would have an undivided interest in the saw-mill with the Crown, and not with the plaintiff. 3. That if, in diverting the water from the fulling-mill, the defendant did no more than was necessary for the reasonable use of the water for the saw-mill, the plaintiff could not recover for that act, and that such question should have been left to the jury.

This was an action of trespass *quare clausum fregit*. The declaration stated that the defendant broke and entered a certain close, saw-mill, fulling-mill and premises of the plaintiff, situate in the parish of Kingston, and broke open, damaged, and destroyed divers doors of the said mills, and broke to pieces the gate-house of the

said mills, and hoisted the gate of the mills, and let off the water out of the dams which drove the said mills, and then and there took possession of, and used and worked the said mills for a long space of time, and against the leave and license of the plaintiff, and then and there broke and carried away certain connections and parts of the said fulling-mill; let off the water, and stopped and disabled the said fulling-mill from being used and worked by the plaintiff, and closed up the said saw-mill and prevented the plaintiff from using the same, and removed and carried away a large quantity of sawed lumber, &c., and converted the same to their own use, by means whereof the plaintiff was put to great expense in repairing the mills, and was prevented during all the time, &c., from using his said mills and carrying on his business of sawing lumber and dressing cloth, and suffered great loss and damages, &c. The plaintiff relied on title and possession. The property was originally owned by David Pickett, who, by his will dated 13th April, 1824, devised the lot No. 11 to his son, Gould Pickett, "excepting as hereinafter mentioned,—that "is to say, one hundred acres of the aforesaid lot of land No, 11, at "the south-east end adjoining the Kennebeccasis river, I give unto "my son and daughter, Abraham Munson Pickett and Hannah "Whiting, to be equally divided between them both. Likewise, I "give unto my son, David Pickett, privilege of keeping a saw-mill "where it now stands, or did stand, with log and lumber yard, with-"out molestation or hindrance; but notwithstanding, the said David "Pickett is not to dispose of the said mill privilege, by sale or gift, "to any person, except it is to his brother, Gould Pickett, or his "liberty"—(then follows a devise of a three-cornered lot, out of lot 11, to Peter Pickett),—"and all the remainder of the said lot, No. 11, "shall remain and be my son, Gould Pickett's, with the above excep-"tion." Gould Pickett died in 1840, and by his will, dated 21st March, 1836, devised as follows: "The farm on which I now reside, "I give to my two sons, Seymour and Munson Gould, together with "all privileges, buildings, improvements, mills, machinery, farming "utensils, to be equally divided, or held as tenants in common, when "Munson Gould arrives at the age of twenty-one years." All the property of Munson Gould Pickett became vested in the Crown by escheat, on the 7th April, 1852, and a decree of partition between the Crown and the heirs of Gould Pickett, was made in June, 1853, and commissioners appointed, who made partition on the 29th October, 1853, and awarded and allotted to "David Pickett the saw-mill, "together with log and lumber yard adjoining the same, as staked "out by us, and the privilege of water for the use of the said mill, to "hold the same to him according to the will of the late David Pickett, "deceased." In may, 1859, the Crown granted to Munson G. Pickett

the land set off, "excepting therefrom a saw-mill, together with the "log and lumber yard adjoining the same, together with the use of "water for the said mill, and shewn on the plot or plan hereunto "annexed, which said portion or privilege, so excepted, was awarded "to David Pickett in the partition of the estate of the said Gould "Pickett, stated or set off by Hallet and other commissioners." David Pickett died in 1861, and by his will, dated 1857, devised to his son Horatio, one of the defendants, "the privilege of a saw-mill reserved "for me in my father's will, out of my brother Gould's portion of his "estate, I leave to my son Horatio, his heirs and assigns, subject to "my agreement to let Munson Picket have the use of it, on condition "of his sawing three thousand feet of lumber annually." At the trial before WILMOT, J., at the last King's Circuit, it appeared in evidence, that the damage done to the plaintiff's fulling-mill was caused by the withdrawal of the water from it, the saw-mill and fulling-mill being supplied with water by the same aqueduct, and the defendants having closed the trap which led to the fulling-mill, to provide sufficient water to enable them to work the saw-mill. A verdict having been found for the plaintiff.

C. W. Weldon, in Michaelmas Term, obtained a rule *nisi* for a new trial, on the grounds: 1. That there were no words of inheritance in David Pickett's will, in the gift of the lot to his son Gould, and therefore a fee did not pass. 2. The grant of the mill privilege to David Pickett was a fee, and not a mere easement. 3. The plaintiff had no title in the mill, because it is expressly excepted in the grant from the Crown.

D. S. Kerr, Q. C., and *A. R. Wetmore*, Q. C., shewed cause in Hilary Term. 1. The whole construction of the will shows that David Pickett intended to give an estate in fee to his son Gould. He is not restrained from disposing of the land, and the words of the will are repugnant to any other construction. 2. The "privilege of keeping a saw-mill," devised to David Pickett, was a mere easement, and could not be construed to mean an estate in fee. A saw-mill is in its nature a perishable structure, and liable to be removed by freshets from its place. A privilege has been defined to mean an easement, which gives no property or possession in the soil. Washburn on Easements, 2 & 4. And an easement can only be created by deed or by grant, and not by will. 2 Am. Leading Cases, 757–'8–'9. This mill was nothing but a chattel. The easement in question being made accessory to and dependant on a saw-mill, a perishable chattel, and no part of the freehold, which chattel either perished or never existed, the privilege was lost accordingly, and the defendant has no title. In any case the privilege was clearly not assignable,

and perished on the death of David Pickett. 3. Although the grant from the Crown to the plaintiff excepted the mill privilege, on the death of David Pickett subsequent to this, the privilege ceased to exist or reverted to the plaintiff, who was the owner of the fee.

S. R. Thomson, Q. C., and *C. W. Weldon*, contra. 1. For the purpose of the argument, it is immaterial whether a life estate or a fee was conveyed to Gould Pickett. If a fee was conveyed, it was done without words of inheritance, and the other devises, including the mill privilege, being made in the same terms, are fees also. If only a life estate passed to Gould, David Pickett, Sr., died intestate as to that part of this property, therefore it would go to the general heirs, and the plaintiff has no right to bring this action. 2. The mill privilege, with log and lumber yard, was clearly a fee, it would be an idle gift if the land was not given with it, and it being excepted out of the lot No. 11, proves that a fee was intended to be given. 3. The mill privilege being a fee, and excepted out of the plaintiff's grant from the Crown, he has no title, and cannot maintain this action.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court, after reciting the facts as above stated:

Is it not clear, so far as title is concerned, that Munson Gould Pickett can have none in the property on which the saw-mill stands? Whatever right he took under his father's will, or as one of his father's or grandfather's heirs, became forfeited to, and by virtue of the escheat vested in the Crown, from which time he ceased to have any interest whatever in the property, and stood in the position of an entire stranger. The only right he now has, is derived from the Crown grant of May, 1859, and this grant expressly excepts and excludes the property in the "saw-mill with the log and lumber yard adjoining the same, and the use of the water for the said mill," which he now claims; so that if the Crown had any interest in this, whether in possession or remainder, it was reserved. If David Pickett (the grandfather) did not give a fee in the saw-mill to his son David by his will, he clearly excepted it out of the devise to Gould, for he only gave Gould lot No. 11, *minus* the portions excepted. If it therefore remained in old David, it descended to his heirs; and the plaintiff would take a share of the interest of his father, as one of old David Pickett's heirs; and if he took thus, it was escheated to the Crown, and was reserved by the Crown out of the grant to the plaintiff, and the defendants, as sons of David Pickett, Jr., would have an undivided interest in it with the Crown, and not with the plaintiff.

If the plaintiff went in under David Pickett, Jr., his interest terminated at any rate at the death of David Pickett, in 1861, whether he had a life estate or a fee. If David had the fee, it passed under his will to the defendants. If he had only a life estate, it vested, on his death, in the heirs of old David Pickett, and those representing such heirs; and the plaintiff's right, as one of such representatives, having escheated to the Crown, he has no title in either view. At most (supposing his right did not vest in the Crown), he could only have a title as tenant in common with the other heirs of David Pickett, senr., of whom the defendants are a portion, and therefore could not maintin this action. The Crown, by the grant to the plaintiff, recognizes the existing right of David Pickett, Jr., and the plaintiff claiming under the grant, cannot repudiate it. It was contended that the defendants are, at all events, liable for the injury to the fulling-mill. There was no evidence of direct injury to the fulling-mill. The act complained of, was the withdrawal of the water which drove the machinery in that mill, and the consequential damages to the plaintiff. It appeared that the saw-mill and fulling-mill were both supplied with water by the same trough or aqueduct: that they could not be worked at the same time, and that when the fulling-mill was in operation, the water was diverted from the saw-mill by a trap, or opening in the aqueduct. The closing of this trap by the defendants, to allow the water to flow to the saw-mill, was the trespass complained of, so far as relates to the fulling-mill. But in doing this, they were only exercising the right they had to use their own mill, or, at least, a mill in which they had an undivided interest, and were not doing a wrongful act to the plaintiff. If they did more than was necessary for the fair and reasonable use of their own property, and wilfully prevented the water from flowing to the fulling-mill, the plaintiff might have asked to have that question left to the jury. But no such distinction was taken at the trial. The principal matter in dispute was the plaintiff's right to the saw-mill; and having failed to establish that right, we think the verdict must be set aside.

Rule absolute.

ALEXANDER *v.* HARTT.

OCTOBER 16.

The owner of land, subject to an estate for life, may maintain trespass *de bonis asportatis*, for carrying away trees which have been wrongfully cut upon the land.

Trespass for breaking and entering the plaintiff's close, and cutting

down and carrying away trees. The declaration also contained an *asportavit* count. At the trial before WELDON, J., at the last Sunbury Circuit, the plaintiff gave in evidence a deed of the land on which the alleged trespass was committed, dated 25th March, 1851, containing a clause of warranty in the following words:—"Free and "clear of all encumbrances, except a lease which Charles Alexander "and Jane his wife hold of the said premises during their natural "lives." The plaintiff went into possession under this deed, and continued so up to the time of bringing this action, there being no evidence of any possession in Charles Alexander and wife, or whether they were alive or not. The learned Judge nonsuited the plaintiff, considering that the deed shewed an outstanding right to the possession in the tenants for life; and even if the plaintiff could recover on his reversionary right he would only be entitled to nominal damages. A rule *nisi* having been obtained to set aside the nonsuit, on the ground that the plaintiff had at all events a right to recover on the *asportavit* count.

A. R. Wetmore, Q. C., shewed cause in Easter Term last, and contended that, as no question was raised at the trial about the plaintiff's right to recover on the *asportavit* count, it could not be taken now. The plaintiff had shewn the right to possession out of himself, and had elected to become nonsuit. [RITCHIE, C. J., referred to Thorne *v.* Bedell, (3 Kerr 339.]

A. G. Blair contra. The plaintiff did not voluntarily become nonsuit, but submitted to the ruling of the learned Judge, and therefore was not prevented from moving to set it aside. [ALLEN, J., referred to Chit. Arch. 8th ed., 435, on this point]. The only effect of the clause in the deed, was to prevent the plaintiff from denying the lease as against Charles Alexander, or any one claiming under him; but no stranger could take advantage of it. Gaunt *v.* Wainman, (3 Bing. N. C. 69). Admitting that the deed shewed an outstanding title in Charles Alexander, the plaintiff proved actual possession; and at all events as reversioner he could recover under the *asportavit* count, for carrying away the trees after they were severed from the land.

Cur. adv. vult.

RITCHIE, C. J., now said that it was not necessary to decide whether, if the plaintiff was in possession of the land, he could recover on the count for breaking and entering the close—there being, according to the deed, an outstanding lease in Charles Alexander; because under the *asportavit* count he had a right to recover substantial damages for taking away the trees, as the interest of the tenant for life in

them determined when they were severed from the land. There must, therefore, be a new trial.

Per Curiam. Rule absolute. (a)

(a) See Cruise's Dig., *Estate for Life*, Ch. 2, § 35, Ward v. Andrews, (2 Chit. R. 636). In the Rector, &c., of Hampton v. Titus, (1 Allen 278), it was held that the owner of the inheritance might maintain trover against a tenant for years, for trees wrongfully severed from the land; and in Humphrey v. Holmes, (Hil. T. 1861), it was held that a person having title to land, though not in possession, might, since the Act 21 Vict., c. 20, § 5, maintain trespass *de bonis asportatis*, for taking away trees cut upon the land.

HUNTER v. MADDOX.*

A constable is liable in trespass, if he arrests a debtor under an execution issued out of a Justice's Court, (1 Rev. Stat., c. 37), before he has used reasonable diligence to find goods to levy on.

Where the debtor points out property to the constable to levy on, it his duty to seize it, unless he has reasonable ground for believing that it does not belong to the debtor; and this question should be left to the jury.

Trespass for false imprisonment. Plea, not guilty, with a notice of defence, that one Campbell had recovered a judgment against the plaintiff, before a Justice of the Peace for the County of Carleton, for $18.45, and had caused an execution to be issued thereon, directed to any constable of the County, requiring such constable to levy of the goods and chattels of the plaintiff, the sum of $18.45; and for want of goods and chattels whereon to levy, to take the body of the plaintiff and deliver him to the keeper of the gaol of the said County, &c.; that the said execution was delivered to the defendant, who then was a constable of said County, to be executed; that the plaintiff had no goods and chattels within the parish whereon the said execution could be levied, and that for want of such goods and chattels, the defendant, as such constable, arrested the plaintiff and delivered him to the keeper of the gaol, which was the trespass complained of.

At the trial before WILMOT, J., at the last Carleton Circuit, it appeared that the plaintiff was attending a Justice's Court when the defendant went to execute the process, and claimed privilege from arrest on that ground. When the trial was over, the defendant told the plaintiff he must either point out property to satisfy the execution, or go to gaol. The plaintiff told the defendant to go to his father's

*This case was omitted from Trinity Term.

house (which was about ten miles distant), and levy on a horse which he (plaintiff) had there. The defendant replied, that if the plaintiff would go with him and point out the horse, he (defendant) would go. The plaintiff refused to do this, and the defendant then arrested him under the execution, and after a good deal of difficulty, succeeded in getting him out of the house for the purpose of taking him to gaol. The plaintiff swore, that when he was brought out of the the house, he pointed out a wagon which was standing near the door, and in which he had come to the Court that day, and told the defendant to take it to satisfy the execution, but that the defendant refused, saying the plaintiff should go to gaol. This was denied by the defendant. The execution, under which the defendant justified the arrest, was in the form directed by the 1 Rev. Stat. 378, and as set out in substance in the notice of defence. A motion was made for a nonsuit on the ground that the defendant, being armed with authority to take the body of the plaintiff for want of goods, an action of trespass was not the proper remedy for plaintiff, but an action on the case, or that the plaintiff should have alleged malice. The learned Judge reserved the point made for a nonsuit, and directed the jury to find for the defendant, being of opinion that the execution was a sufficient justification, and that there was reasonable and probable cause for the arrest.

S. R. Thomson, Q. C., in Michaelmas Term last, obtained a rule *nisi* for a new trial, on the ground of misdirection.

Steadman shewed cause in Hilary Term. The action being against a public officer, should have been case and not trespass, and malice and want of probable cause should have been alleged and proved. The refusal of the defendant to take the wagon instead of the body, was, under the circumstances, no evidence of either, and therefore there was nothing to go to the jury. Even if there had been some evidence of malice and want of probable cause, there was no count in the declaration to which this evidence could have been applied, for no count avers it. The writ is an answer to the action, for all that it is necessary for defendant to prove is the execution, and that he acted under it. The plaintiff cannot relieve himself from the necessity of proving malice and want of probable cause, by changing his form of action.

S. R. Thomson, Q. C., contra. It is an entire fallacy to say, that a public officer, doing an act outside of his duty, requires to have malice proved against him. The arresting of the plaintiff depended here on a contingency, and it is not shown that the contingency happened. The fact of the execution giving him a power to seize in th-

alternative, makes it his duty to use due diligence to see if there are any goods on which he can levy. There is no reason why this action should have been case. When a man acts under color of law, and exceeds his duty, he becomes a trespasser, and the evidence in this case shows that the plaintiff did even more than was required of him, for he pointed out a wagon to defendant on which he might levy. There can be no ground for disturbing the rule.

RITCHIE, C. J., in Trinity Term, delivered the judgment of himself and WELDON, J. (*a*)

(*a*) WILMOT, J., was absent, and ALLEN, J., having been counsel in the cause, took no part in the judgment, but stated that he concurred in the principles of law, laid down by His Honor the Chief Justice.

This was an action for false imprisonment. The defendant was a constable, and arrested the plaintiff under an execution issued out of a Justice's Court, in the usual form, requiring the constable to levy of the goods and chattels of the defendant within his parish, and "for want of goods and chattels whereon to levy, you will take "the body of the said defendant and deliver him to the keeper of "the gaol for the said county." Under an execution such as this, we think it was the duty of the constable to endeavor, by the use of reasonable diligence, to find goods and chattels of the defendant to levy on; and having failed to discover property, and having reasonable grounds for believing that the defendant had not goods and chattels within his parish, then, but not till then, has he authority to take the body. In this case, plaintiff having pointed out to defendant a wagon as his property, the defendant should have levied on it, unless he believed, or had reasonable grounds for believing, that the wagon was not the plaintiff's property. Whether he did so believe, or had such reasonable grounds, were questions that should have been submitted to the jury. In this case, the defendant appears rather to have disputed the fact of the wagon having been offered to him, than that it was the plaintiff's. There was contradictory evidence on this point, which should have been put to the jury. When a party arrests and imprisons another, and is sued for so doing, he must plead or give notice of such matter, as the burthen is on him, to show that he was justified in doing so. Under an execution such as this, defendant could only arrest in the event of want of goods whereon to levy. We think the burthen was on him, of shewing that the contingency had arisen which authorized him to arrest the plaintiff; but apart from this, plaintiff having offered evidence that the contingency had not arisen, we think there was a case which should have been submitted to the jury.

Rule absolute.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NEW BRUNSWICK,

IN EQUITY.

WILSON *v.* HORNBROOK and wife, and MCKENNA.

OCTOBER 6, 1866.

A mortgagor was made defendant in a foreclosure suit, appeared thereto and answered, disclaiming any interest in the property. On motion to dismiss the bill as against the mortgagor.

Held, that as the plaintiff either knew, or had the means of knowing, before commencing the suit, that the mortgagor had conveyed away his equity of redemption in the property, the mortgagor was entitled to his costs.

This was an application made on behalf of the plaintiff, to dismiss the bill as against Hornbrook and wife, two of the defendants, who had been served with a summons, appeared, and been served with copies of the bill and interrogatories. It appeared that the plaintiff must or might have been aware, at the time the suit (which was for the foreclosure of a mortgage) commenced, that the defendants, Hornbrook and wife, had parted with their interest in the property. The question in dispute was whether the amendment could be made unless their costs were paid by the plaintiff. The motion was heard on a former day of the October Sittings.

H. B. Rainsford for the plaintiff.

Straton for the defendant Hornbrook.

Cur. adv. vult.

ALLEN, J., now delivered judgment.

The bill in this case is filed for the foreclosure of a mortgage, given to the plaintiff by the defendants, Hornbrook and wife, in August, 1862, and it alleges that on or about the 24th March, 1863, the said Hornbrook and wife conveyed, by deed, the land described in the mortgage to the defendant, McKenna; that the mortgage is over-due, and that the defendants are entitled to the equity of redemption. The defendants, Hornbrook and wife, have appeared by different solicitors, and the husband has filed a document which has been treated as a disclaimer, stating that he thereby disclaims and renounces all right, title, interest, claim and equity of redemption in and to the mortgaged premises. Whether this, not being sworn to by the defendant, really amounts to a disclaimer, it is not necessary now to discuss. I may merely refer to 1 Turner's Pr. 536, 1 Grant 87, and 1 Daniel 627, to show how a disclaimer ought to be put in. The plaintiff now applies to dismiss the bill as against the defendants, Hornbrook and wife, or which is the same in effect, to amend it by striking out their names. Previous to a decree, the plaintiff may, as of course, apply to dismiss his bill on payment of costs, 1 Turner's Pr. 613; 1 Daniel 632; Dixon v. Parks (1 Ves. Jr. 402). So the plaintiff may amend his bill by striking out the name of a defendant; and if the application is made *before* appearance, the amendment is allowed without costs; but *after* appearance, it must be upon payment of costs;—1 Turner 161, 166; 1 Smith 294; 1 Daniel 285; even though the plaintiff sues *in forma pauperis*. Wilkinson v. Belsher (2 Bro. C. C. 272); Pearson v. Belsher (3 Bro. C. C. 87). It is contended, however, by the plaintiff's counsel, that the amendment should be allowed in this case without costs, inasmuch as the disclaimer does not show that the defendant, Hornbrook, had no interest in the land at the time the suit was commenced, and that if he and his wife had no interest they need not have appeared. If the question depended altogether upon the disclaimer, the plaintiff might perhaps be right in what he contends, as it is certainly open to the construction, that though Hornbrook had no interest at the time the disclaimer was filed (Oct. 2, '66), he had an interest at the time the suit was commenced in Dec., 1865. Had this been the case, he would have been a necessary party to the suit, and not entitled to any costs incurred before the disclaimer. Cash v. Belcher (1 Hare 310); Gabriel v. Sturgis (5 Hare 97); Ford v. Earl of Chesterfield (19 L. & E. R. 434, s. c. 16, Beav. 516). But I think the summons and bill shew that the plaintiff knew, when he commenced the suit, that McKenna had become the purchaser of the equity of redemption, otherwise he would not have included him as a defendant. The bill states that in March, 1863 (nearly three years before the summons issued), Hornbrook and wife conveyed the land to McKenna

By this conveyance McKenna became the owner of the equity of redemption, and the mortgagor and his wife ceased to have any interest in the property. Admitting, as was stated on the argument, but not proved, that the conveyance from Hornbrook and wife to McKenna was not registered at the time this suit was commenced, it is evident the plaintiff had some knowledge of it, and might have enquired of the mortgagor about it, if he had doubts. In Hidrus v. Holton (3 L. & E. R. 596), where the question was, the right of a defendant who disclaimed to be paid costs, the M. Rolls said: "If the plaintiff chooses "to make a person a party, without first asking him whether he has "any interest, he must take the consequences if it turns out that the "party had no interest, and did not claim any." And in Teed v. Carruthers (2 Y. & Col. 31), where the defendant had parted with his interest before bill filed, V. C. Knight Bruce said, that "it ap-"peared to him that that state of things might have been learnt by "the plaintiff, if he had desired to inform himself of it, and that he "should have endeavored to inform himself, before the bill was filed," and he dismissed the bill with costs. In this case, it appears to me that the plaintiff has shewn, by his bill and summons, that he knew, when he commenced the suit, that Hornbrook and his wife had parted with their interest in the land. Had it been shewn, on this motion, that the deed was not registered, and that the plaintiff had applied to Hornbrook for information about the title, which he had refused to give, or had any reason been shewn for making Hornbrook and his wife parties, it would have had a very great effect upon the question of costs. On the other ground—that Hornbrook and wife were not bound to appear, and should not have done so if they had no interest—it is sufficient to say, that the plaintiff has not only served them with a summons requiring them to appear, but has also served them with a copy of the bill and interrogatories requiring them to answer. Upon the whole then, I am of opinion the plaintiff has failed to shew anything to take this case out of the ordinary rule applied to motions of this kind, and that the amendment can only be granted on payment of the costs of the defendants, Hornbrook and wife. No reason is stated why they have appeared separately, and the necessity for it is not very apparent in this case.

HENDRICKS *v.* HALLETT.

NOVEMBER 17, 1866.

The taxation of costs by the Clerk in Equity under the Act 17 Vict., cap. 18, may be reviewed by a Judge of the Court, and the application may be made by motion, stating the objections to the taxation.

The application is not too late if made at the next sitting of the Court after the costs are taxed, though they were taxed during the sitting of the Court.

If the Clerk in taxing acts on a wrong principle, the Court will review the taxation.

Costs of abbreviating pleadings and affidavits used in opposing an application for an injunction are not allowed in the costs of opposing a second application, the same counsel appearing on both motions, and it not being shewn that a second abbreviation had actually been made.

This was an application for a review of the taxation of the Clerk in Equity, on the ground that certain items for abbreviating had been improperly disallowed by him. The motion was made at the last October sittings by

S. R. Thomson, Q. C., for the defendant.

G. Botsford for the plaintiff, opposed the motion.

Cur. adv. vult.

ALLEN, J., now delivered judgment.

This was an application on the part of the defendant, for a review of the taxation of costs, on an unsuccessful motion for an injunction made by the plaintiff. A preliminary objection was taken, that the Court had no power to review the taxation of the Clerk. The reason urged in support of this were, that before the passing of the Act of Assembly, (17 Vict., cap. 18), when costs were taxed by the Masters in Chancery, they derived their authority to tax from the Court, and therefore their taxation was under the control of the Court; but that, by that Act, the power to tax costs was vested in the Clerk, and as no appeal was given, his decision was final. The words of the Act are, (§ 11): "The Registrar of the Court of "Chancery shall be Clerk of the Court on the Equity side, and shall "file, and have the custody of all papers, make office copies thereof "when required, and entries, sign and seal processes, *tax all costs*, "and draw orders and decrees in equity," &c. By the first Section of the Act, the Court of Chancery is abolished, and the Supreme Court is authorized to hear and determine all causes theretofore cognizable in the Court of Chancery, *with the like powers* and jurisdiction, principles of equity law, *and rules of practice, &c.* Before this Act, as has been already stated, costs were taxed by the Masters in Chancery. But as the 8th Section abolished the office of Master,

it was necessary that some person should be appointed to perform the duties which had been discharged by the Masters; and I think it may be presumed that; in transferring to the Clerk in Equity the power to tax costs. the Legislature did not intend to make any greater innovation upon the practice of the Court than the change of officers absolutely required, and only intended to give the Clerk the same powers in taxing costs which had, before that, been exercised by the Masters. It was a part of the *practice*, and one of the *powers* of the Court of Chancery, to review the taxation of the Masters, and where the Act, in express terms, vests the *like powers* and *rules of practice* in the Supreme Court, I think it shows the intention of the Legislature to have been, to give this Court the same supervision over the acts of the Clerk, that the Courts of Chancery formerly had over the acts of the Masters. It is not reasonable to suppose that the Clerks taxation on the *law* side of the Court should be subject to review, and that on the Equity side it should be final. To construe the words of the 11th Section literally, and without reference to the object the Legislature had in view, would give the Clerk not only the absolute power in taxing costs, but also the right to make entries in the minutes and draw orders just as he thought proper, and without any power in the Court to rectify or control them—a construction of the Act which will scarcely be contended for. For these reasons, I think the Court has power to review the taxation. It was contended, secondly, that if there was any power to review, the application should have been by petition, specifying the items objected to, and praying leave to except. Such was the practice in England until recently. 2 Smith 386; Alsop v. Lord Oxford, (1 M. & K. 565); Heighington v. Grant, (1 Beav. 228); and the 2nd Section of the 17th Victoria, cap. 18, declares that the practice of the Court of Chancery in England, prior to March 23rd, '39, shall be the system of proceeding in the Supreme Court in Equity. But though it is laid down in the books of practice, that exception to the Master's taxation can only be made by petition, I do not find any case where it has been expressly decided, that such an objection could not be heard upon a motion pointing out the items objected to. In the Attorney General v. Brown, (1 M. & K. 567), where such a motion was refused, the Lord Chancellor said, that the terms of the notice gave no information with respect to the particular items objected to. It is true he added, that in his opinion a motion was not the proper course; but I think it may be inferred from his language, that if the objections had been specified in the notice, though a petition was the proper course, he might have heard the motion. In the present case, the notice of motion and affidavit state the objections to the taxation. The plaintiff, therefore, has all

the information he could possibly have if the application had been by petition, and the objection is purely technical. In addition to this, the taxation is not brought before the Court as the report of a Master. If I could have found that the Master of the Rolls had adopted the practice of proceeding by petition in questions of this kind, since the Act 17th Vict., I should have followed it; but though there have been some cases of review of taxation, I have not been able to discover in what way they were brought before the Court. Having heard this application, I think I ought not to dismiss it upon a mere matter of form, not in any way affecting the merits of the case. It was objected, thirdly, that the application was too late—that the costs, having been taxed during the sitting of the Court, in August, the motion should have been made at that time. I think, however, that it is in time. If the application had been made by petition, it could not have been set down for hearing before the October sitting, and where the defendant has proceeded by motion at the first Court after the costs were taxed, I think it is not too late. Lastly, it was objected that the taxation was correct,—that the Clerk was the sole judge of the amount to be allowed. In general, the taxing Master is the sole judge of the fact whether the business charged for in the bill of costs has been done—whether it was necessary—and of the proper charge to be made for it; but where he acts upon a wrong principle in the taxation, the Court will interefere. 2 Smith's Pr. 386); 2 Daniel (3rd ed.) 1085; Alsop v. Lord Oxford, (1 M & K. 564); Russell v. Buchanan, (9 Sim. 167). It is admitted that the charges for drawing and abbreviating the affidavit of the defendant, used in opposing the motion for injunction, and for the copy thereof served on the plaintiff's solicitor—also for abbreviating the affidavit of the plaintiff and Mr. Kerr, filed in reply, were improperly disallowed; but I think the Clerk was right, under the circumstances, in disallowing the charges for abbreviating the bill, interrogatories, and affidavits used on the motion for injunction in November last—there being no proof that any such abbreviations were made by the defendant's solicitor, and there being some evidence that they were not made, and were not necessary to be made, to resist the second application for injunction. It was contended that costs of abbreviating the pleadings were not allowed in injunction cases—citing 2 Smith 652, where it is said that on a motion for, or to dissolve an injunction, the charge for the brief copies of the pleadings will be usually allowed, *but not the charge for abbreviating*, which forms part of the general costs in the cause. I do not understand the distinction between "*brief copies of pleadings*" and "*abbreviating*"; but the charge for abbreviating the bill and interrogatories would certainly form part of the general costs in the cause, either as

between party and party, if the suit should be decided in favor of the defendant, or, as between solicitor and client, if the plaintiff should succeed, and it ought not to be allowed twice unless it was shewn to be necessary. So, with respect to the affidavits used on the part of the plaintiff, on the motion for injunction in November —if it was necessary for the defendant's solicitor to abbreviate them for the purposes of that motion, (as it may be presumed it was), I cannot think he is entitled to charge the plaintiff with abbreviating the same affidavits to oppose the last application, unless he shewed that it was necessary to be done, and was done. It may be said, that as the plaintiff was successful on the first motion for an injunction, the defendant would be obliged to pay his own solicitor's costs, for abbreviating the affidavits used on that motion, and therefore ought to be allowed those costs on the second motion in which the plaintiff failed, and was ordered to pay the defendant "his costs of the application"; and I have been referred to the case of Goold v. Dammett, (12 Jur. N. S. 614), where it was held that the costs of settling the minutes of orders was allowable, though there were in fact, no minutes, it having become a practice among the Registrars to issue the orders without previously issuing a minute or draft of them. The conclusion which, I presume, the defendant's counsel would draw from this case is, that as there is a charge allowed to the solicitor in the Table of Fees, for abbreviating the proceedings, he is entitled to charge for it, whether he actually does it or not. Whatever he might have been entitled to if he had succeeded on the first motion for an injunction, (on which, however, I express no opinion), he has not satisfied me that the Clerk was wrong in the conclusion which he came to, in reference to the charges for these abbreviations. A question somewhat similar to this arose a few years ago in the case of Gilbert v. Campbell, on an appeal, where the late Chief Justice Parker held, that the defendant's solicitor was only entitled to charge for one abbreviation of the pleadings, it not being shewn that he had made a second abbreviation for the argument on the appeal, the same counsel being heard on both arguments. The order will be that the Clerk review his taxation, and allow the defendant the costs of any affidavits produced by him to resist the motion for injunction, including copies to serve, and abbreviating—also the costs of abbreviating the affidavits produced by the plaintiff in reply thereto. There will be no costs on this motion.

MILES *v.* COY and FRASER, Executors, &c., of John Harding.

DECEMBER 4, 1866.

A., by deed dated 2nd April, 1853, conveyed to his daughter, a farm, described as the property purchased by him from B., except a part that he had before leased, to hold the same during his life; and after his decease, he thereby gave, granted, bargained and sold, to his said daughter, her heirs and assigns, "all the above-mentioned "premises, and every part thereof." The part excepted had been leased by A. to T. in 1851, for five years, with a covenant to renew or pay for improvements. In January, A. made his will, stating *(inter alia)* as follows:—"I have already con-"veyed to my daughter, E. S., her heirs and assigns, by way of advancement, sub-"ject as in the deed thereof is mentioned, all that farm or tract of land situate, &c., "formerly purchased by me from B., with all buildings, &c., to hold to her, my "said daughter, her heirs and assigns, I do not make further mention of her, my "said daughter, in this, my will."

Held, 1. That the testator's daughter took no estate under the will by implication; 2. that under the deed, she took the whole farm after the death of A.

This was a special case, the facts of which were fully set forth in the judgment of the Court. It was argued at the last October sittings by

A. B. Rainsford for the plaintiff.

Fraser for the defendants.

Cur. adv. vult.

ALLEN, J., now delivered judgment.

This was a special case, stated under the Act of Assembly, 26 Vict., c. 16, to obtain the opinion of the Court, as to the plaintiff's right to a house and piece of land in the Parish of St. Mary. The testator, John Harding, executed a deed, bearing date the 2nd April, 1853, in the following words:—"Know all men by these presents, "that I, John Harding, of the Parish of St. Mary, in the County of "York, farmer, for the natural love and affection that I bear to my "daughter, Elizabeth S. Miles, the lawful wife of James A. Miles, of "the Parish of Douglas, in the said County, and for the sum of ten "shillings to me in hand paid by the said Elizabeth S. Miles, and for "the comfortable support and maintenance of my wife, Sarah Hard-"ing, during her life, free of expense or charge to me, the said John "Harding, and the sum of Ten Pounds yearly, if I shall have no "other means and stand in need of the same for my support, upon "these conditions I do hereby let, lease and to farm, during my life, "unto the said Elizabeth S. Miles, her heirs and assigns, and to pos-"sess and peaceably enjoy all that parcel of land and premises, lying "and being in the Parish of St. Mary aforesaid, and known as the "property purchased by me of the late Stair Bryant Agnew, as by "reference to the title thereof will fully appear, and every part and "parcel thereof, except that I have heretofore leased, with all build-

"ings, improvements and appurtenances thereto belonging, or in "anywise appertaining that is now in my possession; and after my "decease, I, the said John Harding, for the within-mentioned con-"ditions, do hereby give, grant, bargain and sell, unto my daughter, "Elizabeth S. Miles, her heirs and assigns, all the above-mentioned "premises and every part and parcel thereof, with the appurtenances "thereto belonging, or in any wise appertaining, and do hereby war-"rant and defend the same unto the said Elizabeth S. Miles, her "heirs and assigns, forever. In witness whereof," &c. The piece of land excepted out of this deed was a portion of the property purchased by the testator from Stair B. Agnew, and leased by the testator to one Daniel Titus for five years, on the 22nd June, 1851, at an annual rent of £5, with a covenant on the part of the lessor to pay for improvements, if the lessee was unwilling to renew the lease. Titus assigned the lease to J. Myrshrall on the 12th February, 1855, and he, on the 8th February, 1859, released and surrendered all his right and interest to the testator. John Harding died on the 9th January, 1866, leaving a will dated 27th January, 1859, in which, after making certain devises and bequests, he stated as follows:— "Fourthly, I, having already conveyed to my daughter, Elizabeth "Sophia, wife of James A. Miles, her heirs and assigns, by way of "advancement, subject as in the deed thereof is mentioned, all that "farm or tract of land, situate in the Parish of St. Mary, in the "County of York, at or near the mouth of the Nashwaak, commonly "called Moncton, formerly purchased by me from Stair Agnew, and "being my present residence, with all the buildings and improve-"ments thereon and thereunto belonging, to hold to her, my said "daughter, her heirs and assigns, forever; I do not make further "mention of her, my said daughter, in this, my will." He then directed his executors to sell all the residue of his real estate not disposed of by the will, and to apply the proceeds. On the 5th July 1866, Elizabeth Miles conveyed to the plaintiff, all her right and title in the property conveyed to her by her father. The plaintiff contended that under the deed of the 2nd April, 1853, and the will, Elizabeth S. Miles took an estate in fee simple in the whole of the Moncton property, including the piece leased to Titus and the buildings thereon. The defendants, on the other hand, contend that the piece of leased land was not conveyed or devised to Elizabeth Miles, but formed part of the testator's residuary estate, which they were directed by the will to dispose of. I think the question is not affected by the will, and that the plaintiff must stand or fall by the deed. There are cases where, without any express devise, an estate will pass by implication; but in such cases it is necessary that the will shew an intention by the testator to devise something. A mere

recital in a will that a third person has a title to certain property, when in fact the title is in the testator, will not amount to a devise by implication, because in such case the language of the will shews that the testator considered that the person referred to possessed a title to the property already, and therefore no devise was necessary. 1 Jarm. Wills, 460; Adams *v.* Adams (6 Jur. 681; 1 Hare, 537). Here, the testator declares that having already conveyed the Moncton property to his daughter, Mrs. Miles, by way of advancement, he does not make further mention of her in his will. With such language as this, it cannot be said that the testator has shewn the least intention that Mrs. Miles should take anything under his will, on the contrary, he says he does not intend to give her anything. It was contended, that having used in his will, in referring to the conveyance, the words "*all* that farm," &c., the testator shewed that his intention was to give Mrs. Miles the whole of the property. But this argument could only avail in case the clause in the will operated as a devise, which, I have shewn, it does not. It was also contended, that as the will was to be construed as if executed immediately before the death of the testator (1 Rev. Stat. 279), the whole Moncton property passed to Mrs. Miles, the lease having expired, and all the estate, both legal and equitable, vested in the testator before his death. The simple answer to this is, that there is no devise of this property. I come now to the construction of the deed. Under it Mrs Miles, clearly took no interest during her father's life in the land leased to Titus; but I think the testator's intention was, and that the deed will bear that construction, to give her the fee simple in the whole farm after his death. The words are, "and after my "decease I give, grant, &c., unto the said Elizabeth S. Miles, her "heirs and assigns, *all* the above-mentioned premises and every part "and parcel thereof," &c. The premises referred to, were the lands or farm purchased by the grantor from Stair Agnew, and by using the word "*all*," I think he shewed that he intended to convey every part of the farm, for if the portion under lease to Titus did not pass, Mrs. Miles would not get *all* the property. If the grantor had intended to except the leased property absolutely, he might have effected his object by a simple deed to his daughter, in fee, of the farm, excepting therefrom that part of the land, as he has done in the former part of this deed. By using different language to describe the land she was to take during his life, from that which she was to take afterwards, I think he shewed that he did not intend the latter description to be a mere repetition of the former. There appears to be a reason also for excepting the Titus property during his life, which would not exist afterwards, viz., the annual rent of £5, payable by the tenant, which he might require while he lived, but the

benefit of which, after his death, he would very naturally be willing should go with the rest of the farm to his daughter. For these reasons, I am of opinion that under the deed of the 2nd April, 1853, Elizabeth S. Miles took an estate in fee in the whole of the Moncton farm, including the piece of land described in the lease to Daniel Titus, dated the 22nd June, 1851, and that the plaintiffs. claiming under Elizabeth S. Miles, are entitled thereto.

COY *v.* COY

DECEMBER 4, 1863.

Where an injunction had been granted *ex parte*, to restrain an administrator from selling land under a license granted by the Probate Court, on the ground that he had sold property under a former license under value, and had sufficient property in his hands to pay the debts, an application to dissolve the injunction was refused till the defendant had answered, it not being clearly shewn by his affidavits that he had not a portion of the estate in his possession which belonged to the heirs.

An allegation in the bill, that the plaintiff had purchased the rights of two of the heirs, and obtained conveyances thereof, shews a sufficient interest in the subject matter of the suit.

This was an application to dissolve an injunction granted by WELDON, J., to restrain the defendant, as administrator, of David Coy, deceased, from selling land under a license granted by the Probate Court of Queen's County. The facts sufficiently appear in the judgment of the Court.

F. E. Barker was heard in support of the motion, on the 7th November last, and

S. R. Thomson, Q. C.. contra.

Cur. adv. vult.

ALLEN, J., now delivered judgment.

This was a motion to dissolve an injunction granted *ex parte*, to restrain the defendant, as administrator of David Coy, from selling certain real estate, under a license granted by the Probate Court of Queen's County, on the 19th June last. The material facts, as stated in the bill, are: That David Coy died in March, 1860, intestate, leaving seven children, of whom the defendant was one; that in the petition for letters of administration, the real estate was valued at £400, and the personal estate at £25; that on the 18th December, 1860, a license was granted to the defendant, by the Probate Court of Queen's County, to sell a part of the real estate, described as lot No. 10, containing 325 acres, and part of lot No. 3, containing 100

acres, situated partly in Sheffield, Sunbury, and partly in Canning, Queen's County, also part of lot No. 77, in Gagetown, containing about 36 acres, to pay balance of debts due by the intestate, amounting to £202 19s. 9d.; that after selling such land, the defendant applied for and obtained, on the 22nd October, 1861, a further license to sell another portion of the estate, to pay off a balance of the debts due by the intestate, amounting to £61 9s. 9d.; that the defendant sold under this license, part of the property for £20, and the remainder for £68 10s.; that the part sold for £68 10s. was worth at least £90; that on the 19th of June last, the defendant had obtained a third license to sell a further part of the real estate, to pay a balance of debts amounting to £50 18s 9d., as stated in the license, and that the land authorized to be sold by this license was advertized for sale by the defendant. (It was to stay this sale that the injunction was granted.) That the part of lot No. 77 in Gagetown, sold under the first license, was purchased by one Robert McDonald, for £75, it being understood that a mortgage on the land held by one Charles Coy, on which £40 or £50 was due, was to be paid off; that McDonald had reconveyed the property to the defendant, who then had possession of it, but had not discharged the mortgage from the record. That the land sold under the second license was sold below its value, and that if the defendant had exercised ordinary care and prudence in the sale, it would have sold for a sufficient sum to pay off the debts in full. That the personal property and the proceeds of the realty sold, were sufficient to pay all the debts due by the estate, but the defendant had wasted the property. That by reference to the proceedings in the Probate Court, it appeared that a large part of the alleged indebtedness was made up of bills of costs claimed by the defendant's proctor, and for fees of the Court. That the plaintiff applied to the defendant to postpone the sale for a month, to enable him to examine the accounts, but the defendant had refused to do so. That no proper accounts had been filed by the defendant, as administrator, shewing the necessity for the last license. That a citation was taken out by the defendant to obtain the last mentioned license, returnable on the 4th June; that without any sufficient reason the hearing was adjourned till the 9th June, then to the 16th, and finally to the 19th. when the license was granted. The bill also stated that the plaintiff had purchased the shares of two of the heirs of David Coy, and obtained conveyances thereof, and had also bought the rights of two other heirs, and paid part of the purchase money, but had not yet got the deeds. The affidavits of the defendant, and the Registrar of Probates, in support of this application stated, that on the application for the first license, the Probate Court, on the examination of the accounts, found the sum of £202 19s 9d. to be due from the estate; that the proceeds of the sale under that

license were £141 10s.; leaving a deficiency of £61 9s. 9d., exclusive of the costs and expenses; that on application for the second license, the costs of obtaining the first and second licenses were allowed at £14 4s. 1d.; and that the proceeds of the second sale were £88 10s. That in May, 1865, Alex. McUmber, one of the heirs, cited the defendant to file an account of his administration; that he did file an account, whereupon a citation issued, calling upon all persons interested to attend the passing of the accounts on the 15th August then next, that the plaintiff and several of the other heirs attended the Probate Court on that day; that the matter was adjourned till a further day in the same month, when the plaintiff and several of the other heirs also attended; that a number of other adjournments took place, some on the defendant's application, and others against his wish, at some of which meetings the defendant's accounts were partially examined, and the account was finally passed and allowed by the Probate Court on the 31st October, 1865, and the sum of £35 7s. 4d. found and decreed to be the amount then due from the estate. The manner in which the account is made up will be shewn hereafter, That on the 5th May last, the defendant applied for a further license to sell real estate to pay this debt of £35 7s. 4d.; that a citation issued returnable on the 4th June; that on that day the Court was adjourned till the 9th, when the plaintiff attended and requested a further adjournment till the 16th; that the plaintiff again attended on the 16th, and the hearing was then adjourned till the 19th, when the Court ordered the third license to issue, for the purpose of paying the balance of £35 7s. 4d., the further sum of £12 19s. 11., the costs of obtaining that license. and £2 11s. 5d. commission allowed to the administrator, making in all £50 18s. 9d. Copies of the decrees of the Probate Court, made on the 13th October, 1865, and on the 19th June, 1876, were annexed to the affidavit of the Registrar of Probates. The affidavits also stated that at the several sales the land was sold to the highest bidders and that the defendant had endeavored to obtain the highest prices; that he had not acted carelessly or negligently in the sales or in the management of the estate, and had not wasted any of the property, or omitted to collect the debts. There was also an affidavit of the purchaser of the lot sold for £68 10s., stating that to be its full value. In answer to these, several affidavits were read on the part of the plaintiff, stating that portions of the land were sold considerably below their value. The Affidavit of the plaintiff and James W. Coy, one of the heirs of the intestate, stated that one of the lots sold under the first license, and described as containing 100 acres, really contained about 300 acres; that it was bid in at the sale by Gershom Coy, as the agent of the defendant, and for his benefit, for £40; that it was worth £75; that

there was collusion between Gershom Coy and the defendant, both of whom knew the quantity of land in the lot; that Gershom Coy immediately reconveyed the land to the defendant, who had since sold 100 acres of it for £45. and still kept nearly 200 acres in his possession, worth at least £40. That James W. Coy purchased a lot at the second sale for £68 10s., on the understanding that he was to have six months credit: that he afterwards, at the defendant's request, gave up the land to him, and he sold it at private sale to Joseph Coy for the same sum, which was far below its value. They also charged the defendant generally with mismanaging the estate in order to make a profit out of it; and that the proceedings in the Probate Court were vexatious. The defendant produced affidavits in reply, denying the charge of collusion with Gershom Coy, or that he purchased as the agent or for the benefit of the defendant; which affidavit, I think, sufficiently answers that part of the charge. It is not denied that Gershom Coy did reconvey the land to the defendant,—nothing being said about it in the defendant's affidavit; nor is the quantity of land in the lot very clearly explained: the defendant says that after deducting the 100 acres sold, he does not believe there would be 100 acres remaining, and that there is a dispute about the overplus. The statement respecting the sale to James W. Coy is also explained, and his affidavit on that point, is expressly contradicted both by the defendant and Joseph Coy, to whom the land was conveyed. There are a number of affidavits as to the value of the several lots of land, contradicting those on the part of the plaintiff; and several affidavits on both sides, each charging the other party with delaying the proceedings in the Probate Court. A preliminary objection was taken, that the plaintiff had not shewn any interest in the subject matter of the suit. I think, however, that he has shewn a sufficent interest, though he does not state when he acquired his title. The question then is, whether the plaintiff has shewn any right, by the allegations in his bill, to ask for the interference of the Court, or whether the facts which he has so stated, assuming them to be sufficient to obtain an *ex parte* injunction, have been sufficiently answered by the defendant. If the plaintiff, on an application for an *ex parte* injunction, suppresses material facts, the injunction will be dissolved on that ground alone, and the plaintiff cannot, on a motion to dissolve the injunction, maintain it on the merits then disclosed. Hilton *v.* Lord Granville (4 Beav. 130). It would seem, also, that even where there has been no suppression of material facts, if the statements in the bill are insufficient to entitle the plaintiff to an injunction, or are sufficiently answered by the defendant, the injunction ought to be dissolved, though the plaintiff, in his affidavits, in answer to the defendant's affidavits, sets up a new fact, not stated

in the bill, which would have entitled him to the interference of the Court if he had stated it. I apply these remarks to the statement in the plaintiffs affidavit in answer, charging the with defendant making a collusive sale to Gershom Coy, for his own benefit, and the sale to Joseph Coy, by private contract, and at an under value. It is not necessary to decide the question at present, because I think the defendant has answered both those charges. I cannot say that the plaintiff has suppressed any *material* facts, though some of the allegations in the bill, relating to matters within his own knowledge (as it appears), are rather vague and evasive—e. g., in the 18th par., where he states, "that *greatly to his surprise*, the defendant has succeeded in obtaining a third license," and in the 27th paragraph, referring to the citation taken out by the defendant on the license, and the several adjournments. The inference I should draw from the statements in both those paragraphs, is, that the plaintiff was no party to the proceedings to obtain the license—was not present at the Probate Court, and knew nothing about the application till after the license was granted—whereas it appears, by the copy of the decree of the Probate Court of the 19th June, 1866, and by the affidavits of the defendant and Mr. Curry, the Registrar of Probates, that the plaintiff was present investigating the defendant's accounts, and that the Court was adjourned once at his request; and the plaintiff, in his affidavit, not only does not deny these statements, but admits that he opposed the granting of the license, and contended that the defendant had already sold land enough to pay all the debts. The principal question (and a very important one) which arises in this case is, whether the plaintiff should not have appealed from the decree of the 19th June, and whether, while that decree stands, it is not conclusive in all other Courts? There is no charge in the bill that the petition to the Judge of Probates, for the license to sell, did not state all the facts which the act requires, to give the Court jurisdiction—(1 Rev. Stat. 355), or that the Court proceeded without citation to the heirs. The charge in the 21st paragraph, that the defendant had already sold sufficient property to pay off the debts, but had wasted the money, is not sufficient to shew that the Court had no jurisdiction to inquire into the administrator's petition without also alleging that the petition itself was defective. In Doe d. Bowen v. Robertson (Hil. T. 1861), where the defendant claimed under an administrator's deed, and the petition for the license to sell stated the matters required by the Act, the plaintiff sought to do away with the effect of the deed by shewing, that at the time of the application to the Probate Court, there were no debts due from the estate. The evidence was rejected and the defendant had a verdict, and on discharging a rule *nisi*, for a new trial, the Court said: "When

"notice has been given, and a petition, setting out the matters re-"quired by § 35 (1 Rev. Stat. 355) has been presented, the Surrogate "Court has an original jurisdiction to determine the matters to which "that petition relates, subject to the appeal given by § 46 of the "same Act; but it appears to us, the decision of the Court, in matters "so brought within its jurisdiction, cannot be questioned in any other "way." The decision of the Probate Court, on all matters within its cognizance, is final and conclusive, subject to the appeal to this Court. Harrison v. Morehouse (2 Kerr, 584). It is not to be presumed that the Probate Court acted without jurisdiction. If the administrator had wasted the property, and failed, in the plaintiff's opinion, to shew any necessity for a further license to sell land, he might have appealed from the decree. That he had a knowledge of the administrator's accounts filed in the Probate Court, on the application for license, appears by the 26th paragraph of the defendant's affidavit, sworn on the 13th September last, which fact is uncontradicted by the plaintiff. The affidavit states as follows: "That the said plain-"tiff seemed perfectly satisfied with the portion of the deponent's "accounts passed and allowed, and attached to the petition for li-"cense to sell, filed on the said 5th day of May last, and the said "plaintiff had every opportunity of investigating the same, the same "having been read over in his presence, and all those parts of the "said account, objected to by the said plaintiff, being disallowed." Though I am strongly of opinion that the plaintiff's remedy was by appeal from the decree of the Judge of Probates, I am not quite satisfied that he has not some equities, and that the case does not require further investigation. It is said, in Story's Eq. Jur. § 954, that sales may be restrained in all cases where they are inequitable, or may operate as a fraud upon the rights or interests of third persons, as in cases of trusts and special authorities, where the party is abusing his trust or authority. If the plaintiff is not precluded by the decrees in the Probate Court, I think he has shewn a *prima facie* case for the interference of the Court, which, on some of the points, has not been answered. I think the plaintiff is entitled to more information about the surplus of the land purchased by Gershom Coy, and said to be now in the defendant's possession under a deed from Gershom Coy. If that surplus is of the value of £40, as alleged, the estate, and not the defendant, ought in justice, to get the benefit of it. The defendant does not deny that he knew the lot contained more than 200 acres, or that there is a surplus after the sale to Mr. Davis, but says he does not believe that it contains 100 acres. The other heirs have a right to know what the surplus is, and its value. So, with regard to the payment of Charles Coy's mortgage, which was to be satisfied by McDonald out of the purchase money of the

Gagetown lot. When the defendant afterwards took the property back from McDonald, only refunding to him the amount he had paid upon it, viz., the difference between the purchase money and the amount due on Charles Coy's mortgage, it was the defendant's duty to have immediately paid off that mortgage. Whether the subsequent interest and the costs of the suit were charged against the estate does not appear, but I so understood the argument of the plaintiff's counsel; and I find in the accounts, a charge of £12 10s. for interest on the Gagetown mortgage. That the proceedings in the Probate Court have been expensive, cannot be denied. That any expense was unnecessarily incurred, is not for me to say; but the sum of £27 17s. 4d. does appear somewhat extravagant, for passing such an account as is shewn by the copy which is annexed to Mr. Curry's affidavit. Whether the delay and expense attendant on the extraordinary number of adjournments in the Probate Court, was caused by the plaintiff or defendant, or both, is not very easy to determine, and, at present, of no importance. There is another part of the proceedings in the Probate Court, which I cannot understand, viz., a sum of £54 18s. 10d., allowed by the decree of the 31st October, 1865, as debts due (or as stated in the decree, "accumulating") *since the 1st November, 1860.* Administration was granted in March, 1860, and in November of that year, the defendant applied for license to sell the real estate, stating the debts to be £213 13s. 1d. The sale not producing enough to pay this sum, in October, 1861, he obtained a further license to sell land to pay the balance—nothing being said about his having discovered any other debts since the application for the first license; but when his accounts are passed in October, 1865, the Judge of Probates allows £54 18s. 10d. for debts against the estate subsequent to the 1st November, 1860. What these debts were, and why they were not discovered and brought before the Probate Court, on the application for the *second* license, does not appear. It may have been satisfactorily explained at the time; at all events, the plaintiff attended the passing of those accounts with his legal advisor, and might have appealed, if dissatisfied with the decision of the Court, which found a balance of £35 7s. 4d. then due from the estate. The following statement shews how the accounts stood according to defendant's affidavits, after the second sale:—

Amount of debts against the estate allowed by Probate Court in December, 1860,.....	£212	13	1
Funeral and testamentary expenses,.....	14	18	11
	£227	12	0
Less proceeds of personal estates,.....	24	12	3

Amuont for which first license issued,.....	£202	19	9
Proceeds of first sale,.....	141	10	0
Deficiency,.....	£61	9	0
Second application for license to pay this balance, October, 1861:			
Costs allowed on granting first and second licenses,...	14	1	4
	£75	11	1
Proceeds of sale under second license,.....	88	10	0
Balance in hands of administrator,.....	£12	18	11

This statement shews that after paying all the debts then appearing, (more than eighteen months after the intestate's death), funeral and testamentary expenses, and the costs of obtaining both the licenses, there was a balance in the administrator's hands sufficient to pay any commission that would probably be allowed him. I refer to these facts to shew that the heirs may have had cause for dissatisfaction, and also to shew why I consider it right to retain the injunction for the present, though I think the plaintiff's case a very doubtful one. I have not thought it necessary to consider the conflicting statements about the value of the land. If no fraud or improper conduct is made out against the defendant in conducting the sales, he cannot be held liable because the lands sold for less than their value. I am not satisfied that he did any thing to prevent the land from being sold to the best advantage. As one of the heirs, it would be his interest to obtain the highest price, and he appears on two occasions to have postponed the sales for want of bidders. Whether the conveyances to Joseph Coy are good or not, cannot be determined in this suit; but so far as the value of the land is concerned, Joseph Coy paid the same sum for it that James W. Coy bought it for at the auction, where, it is stated, several persons bid for it. James W. Coy now swears that that sum was far below its value. If it was so good a bargain, it is singular he did not keep it. I have not considered the effect of the administrator having omitted to give a bond on obtaining the second license, as required by the 40th Sect. of the Act, no such question arises on the license which is now sought to be impeached; and if the sale and conveyances made by the administrator without giving a bond, are void, the title of the heirs is not divested, and they can recover the land in an action of ejectment. So, also, if the Judge of Probates, in granting the last license, acted without jurisdiction. Doe dem. Elston v. Thompson, (4 Allen 483). The motion to dissolve the injunction will be refused, but

without costs, with liberty to the defendant to apply again after putting in his answer. I regret that this may cause the parties additional expense, but it may lead to a settlement which I think would be for the interest of both parties, as the amount now alleged to be due from the estate must be considerably less than the costs of the suit.

CONRAD J. HENDRICKS *v.* SAMUEL HALLETT.

JANUARY 5, 1867.

An objection that a suit is defective for want of parties, cannot be taken on the argument of exceptions to the defendant's answer.

In answering interrogatories, the defendant must confess, or traverse the substance of each charge in the bill. Particular charges must be answered particularly and precisely, and not in a general manner.

Where defendant is interrogated as to the receipt of particular sums of money, it is not sufficient to refer to an account annexed to his answer, as shewing what he had received, unless he states that it is the best account he can give.

If he states that an account annexed to his answer, contains all the information he is able to give on a particular question, it is sufficient; though it was his duty to have kept a more particular account.

Defendant is bound to answer an interrogatory if it is pertinent to the case made by the bill, though it is not founded on any specific charge in the bill: and *semble* that he should answer an interrogatory whether it is material or not.

Defendant, filling the offices of trustee and executor, is bound to answer an interrogatory, whether his accounts distinguish the receipts and charges as trustee, from those as executor. It is not sufficient to refer the plaintiff to the accounts.

Defendant is bound to answer as to his own transactions, and, if necessary, to obtain information to enable him to do so; but he is not bound to seek information as to transactions not his own, and of matters equally accessible to the plaintiff.

As a general rule, if defendant professes to answer, he must do so fully; and he cannot protect himself from the consequences of an insufficient answer, by objecting that the interrogatory is not warranted by the bill, or that the plaintiff has no equity.

An answer which states a conclusion of law, is insufficient.

When an answer denies or ignores a matter inquired after, it must be as to the defendant's knowledge, information or belief.

Defendant may be interrogated as to the contents of writings, decrees, &c.

Where the discovery would be material to the case made and the relief prayed by the bill, a defendant may be interrogated as to the amount of his property, and his ability to pay; but he is not bound to answer a mere hypothetical interrogatory.

This case, the material facts of which are sufficiently stated in the

judgment of the Court, was argued on exceptions to the defendant's answer, in November last, by

D. S. Kerr, Q. C., for the plaintiff.

S. R. Thomson, Q. C., for the defendant.

Cur. adv. vult.

ALLEN, J., now delivered judgment.

The bill in this case was filed by the plaintiff as one of the heirs and devisees of James Hendricks deceased, against the defendant, as surviving executor and trustee under James Hendrick's will, praying for an account of the estate, both real and personal; that the defendant should be restrained by injunction, from collecting or receiving the funds of the estate; that he should be removed from the office of trustee, and that a receiver should be appointed to collect and receive the moneys, rents, &c., belonging to the estate. The defendant, having put in an answer, the plaintiff filed a number of exceptions which were argued before me in November last, at a considerable length, and which I shall now proceed to examine *seriatim*. A preliminary objection was taken by the defendant's counsel, viz., that the plaintiff was not in a position to except to the answer, because the proper parties were not before the Court. This may be disposed of at once. If the suit was defective for want of parties, the defendant might have demurred, but it would be most unreasonable to allow such an objection to be taken, on the argument of exceptions to the sufficiency of the defendant's answer. If any authority should be required on this point, it will be found in the Vice-Chancellor's judgment, in Taylor v. Randall (1 C. & Ph. 112).

1st Exception. A part of the 14th interrogatory inquires whether the testator, James Hendricks, was not possessed, at the time of his death, of a large amount of property, consisting principally of certain specified descriptions of goods of a late importation, of the value of £10,000 or £12,000, or of what value, and when chiefly imported? The answer states, that the goods were appraised by sworn appraisers, at £8,351; that about £5,083 worth were imported in the spring, previous to Hendrick's death, and that the balance consisted chiefly of old stock. I think this is not a sufficient answer. The defendant was bound either to admit, or deny; or ignore the matters inquired about; but he has done neither. He does not say whether the goods were of the value stated by the plaintiff, or what their value was. It does not meet the interrogatory to say the appraisers valued them at £8,351—the plaintiff had a right to the defendant's oath as to their value, and it is an evasion of the question to state

what appraisers valued them at. So, with respect to that part of the interrogatory, which asks when the goods were chiefly imported, there is no distinct answer. If the defendant had stated the value of the goods left at Hendrick's death, to be £8,351, according to his own knowledge or belief, then the statement of the value of the recent importation might have been sufficient, but, taken in connection with the preceding part of the answer, it is vague and uncertain. It is a well-established rule of practice, that "to so much of a bill as "it is necessary and material for defendant to answer, he must speak "directly and without evasion, and must confess or traverse the sub-"stance of each charge; and wherever there are particular, precise "charges, they must be answered particularly and precisely, and not "in a general manner, though the general answer may amount to a "full denial of the charge." Mitf. Pl. 309; Wharton v. Wharton (1 Sim. & S. 235); Earp v. Lloyd (4 Kay & J. 58). Here there is a specific charge in the bill that Hendricks was possessed of goods, at the time of his death, to the value of £10,000 or £12,000, and an interrogatory founded thereon, which the defendant has not answered.

2nd Exception. Another part of the interrogatory inquiries whether the property left by Hendricks did not also consist of bonds, mortgages and securities on freehold and leasehold estates, bearing interest to the amount of £5,000 or £6,000? It requires no argument to prove that an answer to this, stating that the bonds and mortgage securities were inventoried by the appraisers at £2,745, is insufficient.

3rd. Exception. A similar inquiry about the amount of the book debts is answered in the same way, and is likewise insufficient.

4th Exception. A like answer is given to the interrogatory about the amount of the notes of hand.

5th Exception. The plaintiff inquires whether the leasehold property was not principally in the occupation of tenants paying rent, and whether it was not of the value of £3,000 or £4,000. The answer is, that "the leasehold property appears in the inventory, and "is therein appraised by the appraisers at £875." This is insufficient, as it gives no answer whatever to the inquiry about the occupation, and only answers as to the value, by way of a negative pregnant.

6th Exception. In the interrogatory about the value of the real estate—whether it did not amount to about £22,000—the defendant answers, "that the real estate also appears in the inventory at the appraised value of £21,710."

In each of the preceding inquiries, the plaintiff, after inquiring whether the goods, book debts, notes, &c., did not amount to a cer-

tain named sum, asks, "Are they not so inventoried?" or "Is it not so stated in the inventory filed?" Had the defendant merely been asked how these goods, &c., were valued in the inventory, the answers might have been sufficient; but the interrogatories go further, and seek from the defendant a discovery as to the value, in addition to the inquiry about the appraised value. Even if the inquiry had only been whether the goods, &c., were not appraised at a certain named sum—*e. g.*, the leasehold at £3,000 or £4,000—such an answer as was given in that case would be technically insufficient, as it would neither confess nor traverse the charge in the direct manner required by the practice.

7th Exception. It was admitted that this exception was good. The interrogatory inquires about debts due from the estate, and the answer speaks of debts due to the estate, though it is alleged to have been an error in copying.

8th Exception. The 19th interrogatory asks the defendant, whether, with the amount of property left by Hendricks, the debts due him, the rents of the real estate, and the power which the defendant had under the will of disposing of real estate, there would have been any difficulty of paying off, within a few months, the debts due by the estate, or *within what time he could have done so?* The defendant's answer is, that he believes it would have been impossible, even with all the resources he had, to have paid off all, or the greater part of the debts, "*within a few months*" after the death of Hendricks. The interrogatory is not very precise, and perhaps might be difficult to answer distinctly; but as the defendant has had the whole conduct and management of the estate, and was bound to keep accurate accounts of his dealings with it, he ought to be prepared to give a more definite answer to the inquiry. It is not enough for him to answer the charge literally, and say the debts could not have been paid off *in a few months;* but he should have answered the other part of the interrogatory, *within what time, &c.*, or stated some reason why he could not answer it. This answer is insufficient.

9th Exception. The 20th interrogatory inquires whether the defendant did not sell the personalty for about £12,000, or some other sum? The defendant says he sold the personalty, and that the amount for which he sold it has been fully credited and accounted for to the estate, and appears in his accounts passed and allowed in the Probate Court, (particularly stated in a previous part of his answer), a copy of which was annexed. The defendant does not, in this answer, set up the proceedings in the Probate Court as a bar to the plaintiff's inquiry, but says in effect, "You can see, by referring "to my accounts in the Probate Court, what sum I sold the property

"for"; and this, his counsel contends, is sufficient. But I think otherwise. The defendant was not asked to set out an account of the sales, but merely to state the aggregate amount. In Mitf. Pl., 310, it is said, "Where a bill required a general account, and at the "same time called upon the defendant to set forth whether he had "received particular sums of money specified, it was determined, "that setting forth a general account, by way of schedule to the "answer, and referring to it as containing a full account of all sums "of money received by the defendant, was not sufficient—the Court "being of opinion that the defendant was bound to answer specific-"ally to the specific charges in the bill, and that it was not sufficient "for him to say generally that he had in the schedule set forth an "account of all sums received by him,"—citing Hepburn v. Durant, (8 Bro. C. C. 503). The case of White v. Williams, (8 Ves. 102), may seem to conflict with this rule. But the defendants were called upon to set out an account, and were interrogated as to the total amount of all sums due to, and paid by them, on several particular items. They set forth an account in a schedule to their answer, but refused to set forth the totals as required by the bill, on account of the expenses, and offered an inspection of books. On exception to the answer, Lord Eldon held, that it was not sufficient—that they were bound to give the best account they could by their answers—that the plaintiff had a right to compel them, by their answer, to say that was the best account they could give. "They say," his Lordship stated, "they have set forth the totals by leaving the books in the Master's "office; but no person could be enabled by this to find out the totals. "They ought then to state by their answer, that they have set forth "the totals in the best manner they can. I cannot permit accounts "to be thrown into the Master's office unless the body of the answer "contains an averment that that is the best account the defendant "can give. The principal upon which I go, is, that the plaintiff has "a right, in a suit for an account, to have, by the answer connecting "itself with books and accounts referred to as part of the answer, "the fullest information the defendants can give him." In the present case, when the defendant is asked the amount for which he sold the personalty, he does not pretend to say that he cannot state the amount, or that a reference to the accounts is the best answer that he can give to the inquiry. It was his duty as trustee and executor to keep accurate accounts of all his transactions with the estate, and to be able to furnish the necessary information to the *cestui que trusts*, and therefore I think he should have stated the amount of the sale, or at all events, should have alleged that the account annexed to his answer was the best information he could give. In Drake v. Symes, (6 Jur. N. S. 318),—a case of exceptions

to an answer for insufficiency—V. C. Wood says, "I apprehend the "rule of practice is to be found in White *v.* Williams. I have always "understood it to be this—*that if questions are asked by which you "are required to set out lists* (of debts, debtors, securities, dates, &c.), "and which would be oppressive if you answered it literally, then the "defendant is justified if he says, 'All the accounts which you ask "for are contained in certain books which are in my possession; all "these books are full and true; *they contain the best account I can "give you of the matters*, and you shall have full access to them.' "This is what Lord Eldon says he must pledge himself to." The answer of the defendant in this case falls short of what the V. Chancellor says a defendant must pledge himself to; besides, as I have already stated, he was not required to set out any accccount, and in that respect this case differs from White *v.* Williams, which certainly does not support the argument of the defendant's counsel.

10th Exception. The 21st interrogatory asks, whether the defendant deposited the trust-moneys, separate and apart from his own, and whether he, defendant, did not always, or at some and what time, mix the trust-moneys with his own moneys and use them accordingly? The answer admits that the trust-moneys were not deposited separate and apart from defendant's own moneys; and states that all such moneys were accounted for in his accounts filed in the Probate Court, and that all moneys received since that time have been applird to the legitimate purposes of the estate. The latter part of the interrogatory, as to the use of the money, is not answered. To say that the money was applied to the legitimate purposes of the estate, is evasive, and a violation of the rule before referred to, that specific charges must be answered particularly and precisely. Whether the money was legitimately applied or not, is one of the questions to be determined in this suit, and of which the defendant is not the judge.

11th Exception. The part of the 22nd interrogatory, alleged to be unanswered, is: "Whether the defendant did not allow debts due "from the estate, bearing interest, to remain unpaid till a late period, "and many of them till finally closed by a lawsuit?" I cannot find that any answer is given to this question; but it was objected by the defendant's counsel that he was not bound to answer it, because it is not founded on any allegation in the bill. The word "lawsuit," or any equivalent term, is certainly not used in the 22nd paragraph of the bill, which alleges that the defendant kept and continued the debts unpaid "*till closed as hereinafter stated*," and there is nothing in the subsequent part of the paragraph to shew what that refers to. It is not necessary, however, that every interrogatory should be

founded on a specific charge or statement in the bill, if the inquiry is pertinent to the case made by the bill—1 Dan. Pr. 441, 663, (4th ed.) Thus it has been held that a defendant may be interrogated as to books and papers in his possession, relating to matters in question in the suit, though there is no allegation in the bill that he has any such. Perry v. Turpin (18 Jur. 594); Marsh v. Keith (6 Jur. N. S. 1182; 1 Dr. & S. 342). The plaintiff may expand his interrogatories, so as to cover every incident of the facts alleged in the bill. I think the defendant was bound to answer the whole of this part of the interrogatory.

12th Exception. It is charged in the 22nd paragraph of the bill, that the defendant paid compound interest on debts due by the estate, and the interrogatory asks whether he did not, in many cases, pay compound interest on such debts by paying interest on interest due—paying for discounts and renewals of notes, and charging the estate with it. The defendant's answer is, that he calculated the interest according to the rule of the Supreme Court. I think this is open to the objection that it is stating a conclusion of law, which may not be justified by the facts. Harris v. Harris (3 Hare, 450). At all events, such a general statement is equivocal, and, as said by the Vice-Chancellor in Wharton v. Wharton (1 Sim. & S. 236) "such "a mode of answering may, in some cases, be resorted to, in order "to escape from material discovery; and it is more safe to adhere, "in all cases, to the general rule, that particular charges must be "answered particularly and precisely." That part of the interrogatory which inquires whether the defendant did not pay interest on discounts, &c., is not answered, even if there should be any doubt about the other.

13th Exception. The point of this inquiry is, not what amount of trust-moneys defendant had in his hands; but whether he did not, from year to year, pay compound interest on debts due by the estate, while he had, or ought to have had, moneys of the estate in his hands sufficient to pay off the debts. I do not understand the interrogatory as requiring the defendant to state what balances he had in his hands from year to year. If he had sufficient in hand to pay the debts, the amount is immaterial. He denies positively that he paid such interest when he had estate moneys in his hands, out of which the debts might have been paid. If he had admitted that he had sufficient funds in hand, it would have answered the interrogatory, without his stating the particular amount he had. See Agar v. Regent's Canal Company (Coop. 215) Pullen v. Smith (5 Ves. 21). I think this part of the interrogatory is substantially answered.

14th Exception. The 34th interrogatory asks the defendant—1

Whether he did not allow the principal debts due by Hendricks, to remain unpaid, and interest to accumulate thereon? 2. Whether he did not pay interest on those debts? 3. Whether he did not keep moneys of the estate in his hands while he was paying interest, and, 4. Whether he did not use those moneys in his own business? His answer to the 1st is, that he paid the debts as rapidly as he could raise the means to do so. To the 2nd and 4th he gives no answer; and to the 3rd he says, he kept no large balances of the estate funds in his hands, except when it was necessary to allow funds to accumulate to meet large payments due, or becoming due; that all the moneys received by him, the persons from whom received, the times when received, and how they have been applied, will appear in his said accounts. The latter part of this answer may perhaps be sufficient; but the first part is evasive, and portions of the interrogatory are not answered in any way.

16th Exception. The defendant is asked in the 39th interrogatory, whether the charges and credits relating to the office of trustee, and those relating to the office of executor, were not so mixed up in his accounts that they could not be distinguished? The answer states, that his accounts contain all the moneys received by him, from the sales of the real and personal estate, and from all other sources, but that no separate account of either was filed. The defendant's counsel contends that this answer is sufficient—that the plaintiff can refer to the accounts and get the information. Admitting that the plaintiff could do so, I think he is not bound to make the inspection, but may interrogate the defendant as to the fact. A plaintiff is entitled to discovery from a defendant, either because he cannot prove the facts, *or in aid of proof* and to avoid expense. Mitf. Pl., 307; Story Eq. Pl., § 845. It is therefore no answer to such an inquiry, to say to the plaintiff, that he could prove the fact by the accounts themselves, in a matter which is peculiarly within the defendant's knowledge, and which he ought to be able to answer, for it was his duty not to mix the trust-monies with his own; "to "keep regular accounts; to afford accurate information to the *cestui* "*que trust* of the disposition of the trust property; and if he has "not all the proper information to *seek for it, and if practicable* "*to obtain it.*" Story's Eq. Jur., § 1270—1275; Lewin Trusts, (4th ed.), 448; Walker *v.* Symonds, (3 Swanst., 58); Freeman *v.* Fairlie, (3 Mer. 29). It is quite possible that without filing separate accounts of the proceeds of the realty and personalty, they might be distinguished; but the defendant does not say whether they could or not, and, even if they could, it was his duty to give the information.

17th Exception. Another part of the 39th interrogatory inquires whether the defendant has accounted for the interest accruing on moneys which, from time to time, came into his hands? The defendant says he accounted for all moneys *received* by him from the sales of real and personal estate, from rents and from every other source. The expression "*every other source,*" might perhaps be considered to include the interest, but it is somewhat evasive, and according to the case of Wharton *v.* Wharton, before referred to, does not answer the particular inquiry. Besides this objection, I doubt whether the word "*received,*" in this answer, is not ambiguous when applied to the inquiry about interest. The defendant might be chargeable with interest, and liable to account to the *cestui que trust* for it, though he did not actually *receive* it; as, if he retained balances of the trust-moneys in his hands, when he might have invested them, or if he applied them for his own benefit. Sutton *v.* Sharp, (1 Russ. 146); Wms. Exors. 1673.

18th Exception. The 49th interrogatory requires the defendant to set forth a particular account of the tenancies, rentals, numbers and names of persons occupying, designating each, and the rents payable by each, and to state whether such rents did not amount annually to £1,000 and upwards. The latter part of this is certainly not answered. Defendant says that the yearly rents fluctuated in consequence of certain causes; but he does not state whether they amounted to £1,000 per annum or any other sum. With regard to the other part of the interrogatory he says, that schedule P. annexed to his answer, contains as full particulars of such tenancies, &c., as he is able to give after the great length of time that has elapsed, but he believes it to be correct. That it was the defendant's duty to have kept his accounts and papers in such a way as to give the information, is not disputed, and that the schedule P. (shewing only the amounts received and from whom, but not the rents payable by the tenants, nor the terms of the tenancies), does not contain such information, is quite clear; but if the defendant has given all the information in his power, I think his answer is not open to the charge of insufficiency, because from negligence, or other cause, he has omitted to keep such accounts as a trustee ought to keep. It would be useless to require a further answer from him on this point, if he has already stated all that he knows, or has the means of knowing.

19th. Exception. The 50th interrogatory asks whether lot No. 1412, and the lands fronting on the same, or either of them, was included in the inventory. The question is not answered; but the defendant's counsel contends that it is immaterial whether the lands

were included in the inventory or not, as the answer admits the sale of them, and therefore shows the defendant's accountability. I am inclined to agree in this view, and I may also observe that this lot by number is not mentioned in the bill—the only lots so mentioned are Nos. 1241, 1242, 1328 and 1329. I think this exception must be overruled. Where substantial information is given by the answer, the Court discourages exceptions for insufficiency. Read *v.* Woodroofe (24 Beav. 421).

20th Exception. The 52nd interrogatory asks whether Hendricks, at the time of his death, did not own a leasehold interest in a property in St. John, called the Masonic Hall, under a lease from the corporation of Trinity Church, and for which J. Walker paid defendant, as executor, £500; whether the same does not now appear in writing; and whether defendant did not dispose of the same, and receive the proceeds? The answer to this is: "The said J. Hendricks, "in his life-time, sold his interest in the Masonic Hall, and gave a "title thereto to the purchaser, John Walker. I knew nothing about "it till long after Mr. Hendricks' death, and I had nothing whatever "to shew that he had not paid in full for it, I therefore did not men-"tion it in the inventory. Mr. Walker afterwards mentioned the "circumstance to me, and gave his promissory note for the amount "of the purchase money, and it and the proceeds thereof are duly and "fully credited to the estate in my account filed as aforesaid." The first part of this interrogatory may perhaps be substantially answered, though it would have been much more correct to traverse the fact of Hendricks' having an interest in the property at the time of his death, and to state the fact of his having conveyed to Walker. It is at most an indirect denial of the charge in the bill, and therefore objectionable as a negative pregnant. The same may be said of the answer to the inquiry whether the defendant did not dispose of the property. With respect to the remainder of the interrogatory—"Whether the same does not *now* appear in writing, and whether "defendant did not receive £500 from Walker," it is not very clear what the "writing" refers to—whether it is the ownership by Hendricks, or the payment of the £500 by Walker to defendant. The interrogatory refers to the present time, "*now*," the answer to the *past*, when the defendant prepared and filed the inventory. As to the receipt of the purchase money, the defendant admits indirectly that he received it, but he does not state whether the amount was £500, or what sum. A part of the answer, and perhaps the whole of it, is insufficient, though I do not think the defendant intended to evade the question.

21st Exception. A part of the 55th interrogatory inquires whether

the inventory filed in 1843, contains any goods, &c., but such as had come to defendant's knowledge in 1837; and if so, requires him to state the particulars. It is admitted that this is not answered; but it was contended that it was immaterial, and therefore defendant was not bound to answer it. I cannot say that the inquiry was immaterial. It is very difficult for the Court to draw a line as to what is material and what is not. Unless it appears very clearly that a question is immaterial, I ought to presume that the counsel who drew the bill would not allege facts unless he considered them material to the plaintiff's case, and though the materiality of them might not be very apparent at a certain stage of the case, they might afterwards appear to be very important, and necessary to be inquired into. In Story's Eq. Pl., § 853, *note*, it is said, quoting the evidence of Mr. Bell before the Chancery Commissions:—"The general rule, I con-"ceive to be that he is bound to answer every question that is asked "him, without reference to whether it is or is not material." I think the defendant should have answered this interrogatory.

22nd Exception. Another part of the 55th interrogatory asks whether the defendant does not charge, in his accounts filed in the Probate Court, various named sums of money as paid to William Barr, and from to persons at certain dates, amounting in the whole to £45. The answer is that his account filed in this Probate Court, a copy of which is annexed, shews the sums which are chargd against the estate as paid to Barr and the other persons named, and the services for which they were paid. It is quite clear that this is no answer to the inquiry.

23rd Exception. It is admitted that this exception (to a part of the 56th interrogatory) is good.

24th Exception. A part of the 56th interrogatory inquires whether a number of houses and lots, particularly described, were not producing, or capable of producing, an annual rent of £1,200 or £1,300? The answer is, that the different rents received by the defendant from the property appear in the schedule P, annexed to his answer. It was admitted that this answer was insufficient; but it was said that the first part of the interrogatory was insensible and could not be answered. If the words "*or how otherwise*," are struck out of the interrogatory, the meaning of it is plain enough; and even as it stands, the defendant seems to have understood it sufficiently.

25th to 28th Exceptions. The remaining part of the 56th interrogatory, and also the 58th interrogatory, were admitted, by the defendant's counsel, to be insufficiently answered. These are covered by the 25th, 26th, 27th and 28th exceptions.

29th Exception. The 61st interrogatory inquires, whether the defendant has not disposed of the greater part of the house, lands, &c., left by Hendricks, or how otherwise?—to which he answers, "I have disposed of various portions of said real estate, and a large "portion thereof still belongs to said estate." It was contended that this answer was sufficient; that as the interrogatory was general, the defendant had a right to answer it in the same way—citing, for this, Crowles v. Carter (4 Ired Eq., 405), from the note to the Amer. ed. of Daniell's Pr., 740. See also Story's Eq. Pl., § 855, note 2. Though this interrogatory is general, the answer does not meet it. Defendant is asked if he has not sold the *greater* part of the land, and he does not say whether he has or not.

30th Exception. In another part of the 61st interrogatory, the defendant is asked whether he did not receive the consideration money for the land sold, or secure it, and whether, on such sales, he did not generally receive part payment, and take bonds or mortgages, or both, for securing the balance with interest. His answer neither admits nor denies *directly*, that he received the consideration money, and he makes no answer about taking bonds or the payment of interest on the balances. The answer is therefore insufficient.

31st Exception. The answer to that part of the 61st interrogatory which inquires, whether the defendant did not generally receive the balances of the purchase money with compound interest, is that the interest was calculated according to the rule of the Supreme Court. For the reasons stated in considering the 12th Exception, I think this answer is insufficient.

32nd Exception. The 62nd interrogatory asks, whether the defendant did not make a deed to Thomas Raymond of certain land described, of the date and for the consideration mentioned in the bill, and whether such deed is not registered as alleged? The defendant says in his answer: "I did make a deed to Thomas Raymond. "I do not recollect, and cannot, of my own knowledge, say what "was the date or the consideration expressed in it, but I think it "very probable, and I do not deny, that it was of the date, and for "the consideration, and for the premises in the 62nd paragraph of "the bill mentioned. I do not, of my own knowledge, know that "the said deed is registered as described in said paragraph, but I do "not deny that it is so registered." I think there may be a distinction between the mode in which the defendant would be required to answer that part of the interrogatory as to the giving of the deed, the consideration, &c., and the part which relates to the registry. The first is a matter within his own knowledge—a transaction of his own in his character of trustee—and one upon which he ought to be

able to give full information to the c. q. t., and, as said by Mr. Story, (Eq. Jur., § 1275), "if he has not all the proper information, to seek for it, and if *practicable*, to obtain it." The other—the registry of the deed—is not his act, and he has not necessarily any knowledge of it. In Taylor v. Randell (Cr. & Ph. 104) where a bill was filed for the discovery of the working of mines, in which the plaintiff was interested, and for an account of the moneys due to the plaintiff in respect of such working, the defendants, in their answer, after stating what they knew personally of the matters inquired about, and setting forth a list of documents in their possession, stated that there were other documents in possession of the agents of the Association, containing all the information that could be obtained about the matters in question, but that defendants had no power to use those documents except when sitting at the board of directors, or by an order of the board, and they believed the directors declined to allow them to be used, or to afford them any information that would assist the plaintiff. It was held, that this answer was insufficient, because it did not shew that the defendants had applied to the directors for leave to give the information, and that they had refused. The Lord Chancellor, in giving judgment, said: "If the plaintiff is entitled to "an answer to the question he asks, the defendant is bound to answer "it satisfactorily, or, at least, to shew the Court that he has done so, "as far as his means of information will permit." And again, he says: "If it is in your power to give the discovery, you must give "it; if not, you must shew that you have done your best to procure "the means of giving it." In 1 Daniell's Pr. (4th ed.) 669, it is said, that where defendants have in their power the means of acquiring the information necessary to give the discovery called for, they are bound to make use of such means, whatever pains or trouble it may cost them. In Christian v. Taylor (11 Sim. 405), the V. Chancellor says: "I have always understood the rule to be that a defendant, "*with regard to transactions that are not his own*, is not bound to "find out information for the purpose of communicating it to the "plaintiff." The following cases may also be referred to on this point, viz:—Stuart v. Lord Bute (12 Sim. 460); Earl of Glengall v. Fraser (2 Hare, 99); Attorney General v. Rees (12 Beav. 50). I admit that these cases are somewhat distinguishable from the present, because in the first, the defendant was required to obtain information from the books of a firm, of which he was a member; in the second, he was required to state what entries were made by his solicitors relating to the transaction, though they had ceased for several years to be his solicitors; and in the last case, the information sought for, (the working of a mine), was in the reach of the defendant, by inquiry of the workmen under his control. Here, it may be said,

that if the defendant has not the information asked for, he can only obtain it by applying to the purchaser of the property, who is not in any way under his control, and for whose acts he is not answerable, and that such information is equally accessible to the plaintiff; but the distinction, I think, is, that the conveyance to Raymond was a transaction of the defendant's own, as trustee, that he ought to have known and been able to tell the plaintiff distinctly what property he conveyed—the consideration money and the time of the sale. It was contended by the defendant's counsel, that the plaintiff could prove the conveyance by a copy from the record, and therefore the defendant was not bound to discover more fully. The answer to that argument is, "that the plaintiff is entitled to an answer from "the defendant, not only in respect of facts which he cannot other-"wise prove, but also as to facts, the admission of which will relieve him from the necessity of adducing proof from other sources." Earl of Glengall v. Fraser (2 Hare, 105). I think, therefore, that so far as relates to the first part of the inquiry, the defendant was bound to obtain the information, or at least to show that he had done his best to procure it. With respect to the registry of the deed, I do not think it was the defendant's duty to obtain the information. It is no part of a vendor's duty to see that a purchaser registers his deed. I do not understand the form (E) of an answer given by the Act 17 Vict., c. 18, as amounting to a legislative declaration that a defendant is bound to answer the interrogatories positively in the words there given. The 8th section of the Act says, that the answer shall be similar to the form (E) with such variations as in each case may be necessary. The words in the form *(or as the case may be)* appear to me to show that the form was only intended as an example, to be followed where the defendant admitted the allegation, leaving it open to him to vary the statement according to circumstances. Take the form given of an answer in a foreclosure suit, where the interrogatory is, whether a mortgage was not given as alleged in the bill, and duly registered. Unless the defendant had actually searched the records and seen the mortgage there recorded, he could not positively admit the registry. What obligation is there upon him to make such search? Surely it would be sufficient, if he had no personal knowledge of the matter, to state his *belief*. In the Earl of Glengall v. Fraser *(supra)* the V. Chancellor says: "I guard myself "against being understood to express any opinion that a defendant "is bound, in all cases, to seek information which is equally accessible "to both parties, and which is not either in his own possession or "knowledge, or that of his agents, or of persons within his control, "or for whose acts, with reference to the matter in question, he is "answerable. Take, for example, the case put in argument:—I do

"not think that the plaintiff, calling on the defendant to state whether "a person did or did not die on a certain day, as a general rule, has "any right, in order to procure the information, to require him to "examine the parish register."

Another question arising on this exception is, whether the words "*I do not deny*," are a sufficient admission of the registry. That these words were not intended as an express admission of the fact, is evident from the preceding words of the answer, "*I do not, of my own knowledge, know*," &c. The defendant then, by this answer, must either have intended to express his belief that the statement in the bill of the registry of this deed, was true, or to evade answering the question. Now the rule is, that as to facts which have not happened within defendant's own knowledge, he must answer as to his information and belief, and not to his information merely, *without stating any belief, either one way or the other*. Story Eq. Pl. § 854; 1 Dan. Prac. (4 ed.) 668. In a treatise on Equity Pleading, by Mr. Dreury, a Chancery Barrister of experience, it is said: "When an "answer denies or ignores any matter inquired after, it must be as "to the defendant's *knowledge, information or belief;* for a man may "believe a statement, though he neither knows nor has been informed "that it is true, and he may have been informed that it is true, and "not believe it. Therefore it will not do in an answer for a defend-"ant to say, simply, 'I cannot set forth,' for that may mean, 'I will "not set forth;' but he must say, 'I deny (*or* I cannot set forth) as "to my *knowledge, information or belief*.'" As the object of the interrogatories is to get upon the record an admission of the facts charged by the plaintiff, it is important for him to see that the admission is such as can be read as evidence of the fact, and dispense with the necessity of other proof. A statement by the defendant that "*he believes*," or that he has been "*informed* and *believes*" that such a fact is true, will be sufficient, unless such statement is coupled with something to prevent its being considered as an admission—the rule in Equity being, that what the defendant believes the Court will believe. 1 Daniell's Pr. (3rd ed., 874; 4th ed., 780). I have no idea that the defendant, in answering as he did, intended to evade the question, but having departed from the long-established practice, and made use of somewhat ambiguous language, I must hold his answer insufficient. An objection was taken by the defendant's counsel, that he was not obliged to answer as to his *belief*, unless he was so required by the interrogatory. I had some doubt on this point during the argument, but on further consideration, I think the interrogatory is sufficient. Before the Imperial Act, 15 and 16 Vict., c. 86, from which our Act, 17 Vict., c. 18, was principally copied, the interrogatories expressly required the defendant to declare the truth

of the several matters inquired after, according to the best of his knowledge, remembrance and belief. In the 3rd edition of Daniell's Pr., 588, it is said: "The defendant, *if so called upon*, must answer as to his *knowledge, remembrance, information and belief;*" but in the 4th edition of Daniell's Pr., 668, published in 1865, the words "*if so called upon*" are omitted, and it is stated without any qualification that the defendant must answer as to his knowledge, remembrance, information, or belief. By reference to the form of interrogatories established under the Act, 15 and 16 Vict., they will be found to contain only the particular questions to be answered, without any direction as to the manner in which they are be answered. See Daniell's Pr., 3rd ed., 263; Morgan's Orders, 595. The reason for this omission in the recent forms, I take to be, that as it was the established law and practice of the Court of Chancery that a defendant should answer in that mode, any particular direction in the interrogatory was unnecessary and superfluous.

33rd Exception. For the reasons given on the 32nd exception, I think the answer to the 63rd interrogatory about the conveyance to Andrew Moore, is insufficient. It is not enough for the defendant to state that he does not know what consideration is stated in the deed.

34th Exception. The 66th interrogatory inquires, whether a great part of the purchase-money of property sold to one Coigley—viz., about £400, or some other sum—was received by the defendant? The answer states that two payments—one of £80, and the other of £20—were mode to the defendant, and that several other payments were afterwards made on the mortgage, but he does not state whether he did, or did not, receive £400, or what sum he did receive. This is clearly insufficient. He neitheir admits, nor denies, nor ignores the fact alleged and interrogated to.

35th Exception. The defendant is asked in the 68th interrogatory whether he did not make a deed to one Benjamin Peel, of certain premises, and of the date and for the consideration (£500) mentioned, and whether such deed is not registered? To which he answers, "In the year 1840 I sold the lands, &c., in the 68th paragraph of the "bill mentioned, to Benjamin Peel. I do not recollect the month in "which the sale was made, or what sum was mentioned in the deed "as the consideration. I, at the same time, sold him the land in the "69th paragraph mentioned. I do not now recollect whether all "such lands were included in one deed, or whether two deeds were "given. If two deeds were given, the consideration mentioned in "one was, I believe, £500, and in the other, £175." He answers about the registry as in the 62nd paragraph. For the reasons already

stated in considering the 32nd exception to the answer, I think this is insufficient.

36th Exception. The 69th interrogatory also inquires about a deed to Benjamin Peel, and the answer to which is contained in the last preceding answer, and for the reasons already stated, is insufficient.

37th Exception. The 85th interrogatory asks (in the same terms as the 69th), about a deed given by defendant to Johnson Wilkins. The answer is—"I did make a deed to Johnson Wilkins of, as I "believe, the date and of the premises mentioned in the 85th para-"graph of the bill, but not for the consideration therein mentioned. "The sum for which I sold the said premises was £200—that sum "was the consideration for said deed, and that sum, and not £400, "was, as I believe, the consideration mentioned therein. If £400 is "mentioned therein as the consideration, it is an error. I do not "doubt that said deed is recorded as in said 85th paragraph men-"tioned. If, by said deed, I have acknowledged the receipt of £400, "such acknowledgement was erroneously and mistakingly made, and "£200 is the only sum which should have been therein inserted and "acknowledged to be received." The bill alleges the consideration *stated in the deed* to be £400, and the interrogatory inquires, whether the defendant did not give a deed stating such consideration. As the giving this deed was the defendant's own act, he was bound, as I have already stated, to use all the means in his power to obtain the information and answer distinctly and positively. Though defendant was not asked for what sum he sold the property, I think it would have been open to him, after answering distinctly as to the sum mentioned in the deed, to have gone on and explained (as he has done) that such sum was not the real consideration, (that question does not arise now, however); but his answer neither admits nor denies that £400 is the consideration stated, and he does not show that he has endeavored to obtain the necessary information to answer. The answer as to the registry differs somewhat from the answer to the 62nd interrogatory, but it is more ambiguous, and, for the reason given in considering the objection to that answer, I must hold this insufficient.

38th Exception. The 89th interrogatory asks whether defendant did not, on the 6th April, 1839, convey by deed to J. Wannamaker, land in the Parish of Norton, called lot No. 2, and parts of lots No. 3 and No. 1, in the Knox grant, for the consideration of £625. The answer is, that on or about the 26th April, 1839, defendant made a deed to Wannamaker of 400 acres of land in Norton, part of the Knox grant, for £625, but he does not recollect and cannot state the

numbers of the lots sold and mentioned in the deed, *but does not doubt* that the deed so given by him is the deed mentioned in the 89th paragraph of the bill, and the land therein mentioned. For the reasons already stated, this answer is insufficient. The statement that he made a deed on or about the 26th April, is neither an admission nor denial of a deed alleged to have been made on the 6th April, and the expression, "*I do not doubt*," cannot be considered as equivalent to a statement of the party's *belief* of a fact charged.

39th Exception. It is admitted that this exception is good, though it is alleged that there has been a mistake in copying the answer, whereby defendant is made to speak of a sale made *to* I. & H. Kinnear, instead of a sale *by* them, as stated in the bill. The material part of the interrogatory, viz., the net amount of the sale, is admitted by the answer to be the amount stated in the bill.

40th Exception. It is admitted that this exception is good. Defendant is asked the terms and conditions of a sale, and he says he has not examined his accounts, &c., and therefore cannot say with certainty what they were, but *does not doubt* they were as mentioned.

41st Exception. No sufficient answer is given to that part of the 116th interrogatory, which inquires whether it does not appear by a certain voucher, filed by defendant with his accounts in the Probate Court, that *a large part* of the sales made by I. & H. Kinnear was immediately received in cash, and the remainder on certain stated credits? The defendant after stating, as above, that he cannot say with certainty what the terms of sale were, says, that a *portion* of the sales was immediately receivable in cash, and the remainder, he has *no doubt*, was by the terms of sale payable at the time mentioned in the bill. I think, in the first place, that the defendant should have examined the voucher, and stated what the terms of sale were; but even if he was not bound to do that, he should have stated what part of the sales was payable in cash. The statement "*a portion*," is too vague, it may be either a *large* or a *small* part.

42nd Exception. I also think the latter part of the 116th interrogatory is not answered. The question is, whether it does not appear by the aforesaid sales, *i. e.*, (as I understand it) by the voucher referred to in the previous part of the paragraph shewing the terms and conditions of the sale, that the whole of the purchase money would be due September 30, 1838, and bear interest from that time, or some other time. The answer is, "I deny that the proceeds of "such sales were entitled to bear interest, or that the estate is entitled "to interest thereon from September 30, 1838, or from any other "date, as those proceeds as they were received were required for, and

"applied towards the payment of the debts due by the estate." This answer is a clear evasion of the question, though perhaps not so intended. The bill alleges that purchases to a certain sum were to be paid in cash, other sums in three, six and nine months respectively, and that the whole would be due on the 30th September, 1838, and bear interest from that date. The interrogatory founded thereon, asks defendent if it does not so appear by the conditions of sale filed with his account. If he intended to deny the fact, he should have done so in direct terms, positively and certainly, and should have set out what the terms of sale were, in order that the Court might see whether interest was due after the 30th September. Harris *v.* Harris, (3 Hare 450).

43rd Exception. For the same reason, the answer to the 117th interrogatory is insufficient.

44th Exception. The defendant should have answered the 118th interrogatory, as to the terms of the sale to Jarvis. I do not read the interrogatory as inquiring whether, by the terms of sale, interest wonld not be payable on the balance after April 26th, 1838, but whether it would not accrue by law from the balance being payable at that time. The statement in the bill on which the interrogatory is founded is, that the terms of sale were, "£1,000 immediately payable in cash, the remainder in six months from thence, and accordingly the balance of the purchase money was received, or entitled to be received, and on interest on the 26th April, 1838." By the Act 12 Vict., c. 39, § 27, (2 Rev. Stat. 358), interest may be allowed on all debts or sums certain payable at a certain time, by virtue of some written instrument. An interrogatory whether interest would not accrue on the balance from the time it was due, would be a matter of law which the defendant need not answer, (1 Daniell Pr. 666); and his denial of the liability for interest, cannot affect the case. It is not like the case of an inquiry about a *fact*, which the defendant might protect himself from answering, but which, if he professes to answer, he must do so fully. The first part of the interrogatory, as to the terms of sale, is not answered, and therefore the exception must be allowed.

45th Exception. The latter part of the 118th interrogatory asks whether the interest on three sums stated, viz., two sales to I. & H. Kinnear and the sale to Jarvis, from the time they were received, or receivable, till March, 1844, would not amount to £2,000. The defendant's counsel contends that this is matter of law, which he is not bound to answer. The question, however, is not whether certain sums will carry interest, but whether the interest on these sums between two periods, would not amount to £2,000. It is a question of

fact, and a matter of calculation, the answer to which may not be very material. I have had some doubts about it, but upon the whole, I think the defendant was bound to answer it, and not to state his conclusion that the estate was not entitled to interest, which is certainly a question of law. He cannot, by denying the plaintiff's title, refuse a discovery. Great Luxenburg Railway Company *v.* Magnay (23 Beav. 646).

46th Exception. The substance of the 119th interrogatory is, whether it does not appear by the defendant's accounts between March, 1837, and March, 1844, that he had in hand, over and above his expenditure, large sums of money, amounting to upwards of £3,000 annually, while at the same time he was paying interest on debts due by the estate, and raising money at heavy discount? The answer is, that a *correct* and *proper* examination of the accounts will not show that the defendant was in any way receiving large sums of money over and above his expenditure; or that he retained any balances of money that he ought to have applied towards paying the debts of the estate; or for interest on which he ought to have credited the estate; but on the contrary, said accounts and vouchers show that all moneys received by him were from time to time, as received, correctly applied towards the payment of the estate debts, and in payment to the several *cestui que trust.* It did frequently happen that moneys had to accumulate to meet large demands coming due, but except on these occasions, all moneys were paid out almost as fast as received. The expression, "a *correct* and *proper* examination," &c., is vague and uncertain. The question is, whether the accounts show what the plaintiff asks, or whether they do not; and the defendant should have admitted or denied the fact distinctly, and should have answered whether the money amounted to £3,000 per annum, or not. It is a particular charge, which should have been answered particularly and precisely, even though the general denial that he retained any money in his hands which ought to have been applied to the payment of the debts, might amount to a full denial of the charge. (Story's Eq. Pl. § 852; Daniell's Pr. 740.)

47th Exception. The answer to the first part of the 122nd interrogatory, asking whether the defendant did not pay to Charles Johnston, or allow him to receive large sums of the trust money, is admitted to be bad.

48th Exception. The answer to that part of the 122nd interrogatory, which inquires about the Willard mortgage, is also admitted to be insufficient, if the interrogatory is warranted by the charge in the bill, which it is contended it is not. But I think otherwise. As already stated, in considering the 11th exception, a defendant is bound

to answer any interrogatory which is pertinent to the case, made by the bill, though it is not founded on any specific charge in the bill. The fact alleged in the bill here is that the defendant wrongfully permitted Charles Johnston to receive portions of the trust money, and I think it is quite pertinent to this charge to ask whether Johnston did not receive the proceeds of a particular mortgage. In addition to this, the defendant having professed to answer the interrogatory, must do so fully, and cannot protect himself from the consequences of an insufficient answer, by now objecting that the interrogatory is not warranted by the bill.

49th Exception. Whether the defendant *wrongfully* exhausted and wasted the funds of the estate was a question which perhaps the defendant need not have answered; but having professed to answer it, he must give a full answer. It was not enough to deny in general terms, that he wasted the funds; he should have given some answer to the inquiries about the payment of interest and the discounts. A general denial must be accompanied by an answer to special circumstances. See Daniell's Pr. 3rd ed. 590; 4th ed. 671; Wharton *v.* Wharton (1 S. & S. 235).

50th Exception. The latter part of the 123rd interrogatory, inquires, whether it does not appear by the defendant's acconnts, that he paid for interest and discounts, between 1837 and 1860, between £11,000 and £12,000? His answer is, that all his payments for interest and discounts and all other purposes, and the respective amounts thereof, and all his charges against the estate, appear in his accounts and the copies annexed, and that all the said accounts have been investigated, adjudicated upon, and finally passed and allowed, and he submits that the same are closed and disposed of. If the defendant was bound to answer this interrogatory, it is clear that he has not done so. But he submits, in substance, that he is not bound to answer it, because the matters to which it relates have been already adjudicated upon, and determined in the Probate Court. I do not think it necessary to consider the authorities which were cited upon the question of the jurisdiction of the Probate Court, because I think that question does not necessarily arise at present. If the defendant considered the proceedings in that Court conclusive, he might have pleaded the decree in bar to the plaintiff's bill, or to part of it; and though he may make the same defence by way of answer; if he makes a defence by answer instead of plea, he must answer fully as to the facts, for a defendant cannot protect himself from discovery by raising by answer, a defence which he might have pleaded. Daniell's Pr., 3rd ed. 588, 4th ed. 668. In Lancaster *v.* Evors (1 Phill. 351, 8 Jur. 133), the Lord Chancellor says: "There is no principle

"more clearly established in this Court than this—that when a party "answers he is bound to answer fully. If he has a defence against "the equity set up by the plaintiff, and wishes to avail himself of "that defence, without making any discovery as to the facts that are "alleged in the bill, he must avail himself of that defence, according "to the nature of the case, either by demurrer or by plea. I con-"sider that as a settled rule." He then referred to the cases in which the rule has been acted on, and proceeded: "I consider, therefore, the "rule as settled, and for this among other reasons, that if a party "chooses to answer, and the defence which he sets up by answer, "should be decided against him, it is of the utmost importance, that "these consequential matters, which are material to the cause, and "material for the purpose of the decree, should receive an answer. "That is one of the grounds, and one of the essential grounds, on "which this rule has been laid down." See also Read v. Woodroofe (20 Beav., 421); Leigh v. Birch (32 Beav., 399—9 Jur. N. S., 1265); Swabey v. Sutton (9 Jur., N. S., 1321). I think, therefore, that the defendant was bound to answer the interrogatory and that this exception must be allowed.

50th Exception. The 124th interrogatory asks whether defendant did not make large disconnts on the notes of purchasers of the property of the estate, at a loss to the estate; and whether his accounts of 1837 and '38 do not shew it; and whether, at the time of such discounts, the balance of moneys was not largely in favor of the estate? I think the first part of this interrogatory is substantially answered. The defendant admits that he did sell a large portion of the assets of the estate on credit, and that the greater portion of the notes given by the purchasers were discounted by the bank; that in some cases the notes were renewed, and he paid the discount; that by selling on credit he obtained much higer prices than if he had sold for cash; that he has no doubt the increased price he obtained by selling on credit far more than counterbalanced the discounts he had to pay, and he believes the estate was saved from expense, by the system he adopted of selling on credit and discounting the notes. He does not answer whether his accounts shew there was a loss, nor how the balance of moneys was at the time of the discounts. The answer is, therefore, insufficient in part.

51st Exception. The 125th interrogatory inquires whether the defendant has not paid nearly £500 for ground rent, interest, repairs, costs, &c., out of the moneys of the estate, upon the Lockhart House? The answer states, that the property was subject to a ground rent of £25 a year, which he had to pay up to 1st May, 1856; that during the time he held the property, it required frequent repairs, which he

had to pay; that two suits were brought against him for rent which he paid with costs—£28 1s. 2d. at one time, and £33 7s. 10d. at another, that he charged certain sums for horse hire, &c., and that all these payments and charges, appear in some or one of his accounts filed and passed in the Probate Court. This is clearly insufficient—he neither admits nor denies that he paid £500, nor states what sums he did pay.

52nd Exception. To an inquiry, whether he did not pay nearly £1,100 interest on the Jeffries debt, the defendant says that he paid the principal at different dates mentioned, and that he paid interest upon it, and that all the payments made on account of it will appear in his said accounts. This, also, is insufficient.

53rd Exception. A part of the 131st interrogatory inquires whether one Wentworth did not offer the defendant certain *reasonable*, or some other and what terms, in order to avoid litigation, and to have a dispute between them compromised? The answer states that Wentworth never offer any *reasonable* terms of compromise or settlement; but he does not state, as he should have done, whether Wentworth offered any terms, and if so, what they were. It is admitted that the next exception, which relates to the same matter, is good, and the answer insufficient.

55th Exception. Another part of the 131st interrogatory inquires whether Wentworth did not apply at the house of Mrs. Hendrick's, to see her on the subject of the dispute in order to compromise, and whether she, by the special advice of the defendant, did not refuse to see Wentworth on the subject? The answer is, "I do not know "of his applying at the house of Mrs. Hendricks at any time to see "her on the subject. I never advised her to refuse to see him." The first part of the interrogatory is not answered. Defendant should have answered as to his information and belief. See exception 32.

56th Exception. To that part of the 131st interrogatery which inquires whether the arrest of Wentworth did not immediately follow angry words between him and defendant, in which the defendant made a certain statement about a house. The defendant admits having held Wentworth to bail for the sum stated, and says he thinks it very probable that he may have expressed his opinion to Wentworth and that an angry discussion may have followed, though he has no recollection that such was the case, nor can he possibly recollect, at this distance of time, any remarks he may have made to Wentworth. Strictly and technically this answer is insufficient, as the defendant neither admits nor denies that the arrest immediately followed angry words, nor states any belief of the defendant on the

subject. So far as relates to the conversation between the defendant and Wentworth, I think the answer is sufficient.

57th Exception. Part of the 132nd interrogatory inquires, whether a certain number of law suits did not arise out of the dispute with Wentworth; whether the defendant's accounts and vouchers filed in the Probate Court do not show it; and whether such dispute was not determined in equity against the estate? The defendant says that he cannot remember the exact number of the suits, but he has no doubt his account filed in the Probate Court will show the number. That after proceedings in equity had been commenced and carried on for a long time, all such suits and disputes were terminated and settled, and mutual releases given by him and Wentworth, and that the damages, costs and charges were paid by defendant out of the funds of the estate. It is clear the defendant has not answered the first part of this interrogatory, and for reasons before given, I think it was his duty to ascertain and state the number of suits. The defendant's counsel contends that he was not bound to state how the suits terminated, that is matter of record which could not be proved by the defendant's admission. If the defendant intended to take this objection, he should have declined giving any answer to that part of the interrogatory, instead of undertaking to answer it, and doing so insufficiently. He impliedly admits that the suits were determined against the estate, when he says that he paid the damages, costs and expenses; but if he intended to admit it he should have done so distinctly and positively. But I think he could not object to answer the interrogatory. As a general rule, when a defendant answers, he must answer fully to all the charges in the bill. The only exceptions are: 1. Matters which are purely scandalous, impertinent or immaterial. 2. Anything which may subject him to a penalty, forfeiture or punishment. 3. Anything that would involve a breach of professional confidence. 4. Matters respecting his own title. In these cases, the defendant may, by answer, insist that he is not bound to make the discovery. (Story's Eq. Pl., § 846; Daniell's Pr., 3rd ed., 583). The rule of evidence in the Courts of Common Law, that a witness cannot speak as to the contents of a writing, does not apply to answers in equity; for it is the constant practice to interrogate defendants as to the contents of deeds—the very form of interrogatory given in the Act 17 Vict., c. 18, shows this—and by reference to the precedents in Vanheythusen's Equity Draftsman, Vol. 1, pages 116, 510, 550, 577, and 631, it will be seen that interrogatories are asked, not only as to the contents of deeds and writings, but as to proceedings and decrees in suits, letters of administration, and commissions of bankrupts.

58th Exception. It was admitted that that part of the 132nd interrogatory which inquired as to the amount of damages, costs, &c., paid by the defendant was not answered. I think he should also have answered the latter part of it—whether his accounts do not show that he paid the amount charged in the bill.

59th Exception. The 133rd interrogatory inquires whether the suits referred to were not of the nature stated in the bill, and terminated as there alleged. The bill enumerates ten suits—some at law and others in equity—in all of which Wentworth was a party, and in most of which the present defendant was also a party, stating how they were terminated, and that the costs, &c., were paid out of the moneys of the estate. The defendant, in his answer, says he cannot recollect the number of suits, and is wholly unable to state their nature, or how they were terminated, or the respective amounts of damages, costs, &c.; that all sums paid by him on account of them will appear in his accounts, and were passed and allowed by the decree of the Probate Court, and are, therefore, he submits, as far as those charges and payments are concerned, finally closed. I need only refer to what I have stated in considering the 50th exception, and for the reasons there given, must hold this answer insufficient.

60th to 68th Exception. Another part of the 133rd interogatory asks whether a suit brought by the defendant and Mr. Hendricks against Wentworth (one of the ten suits above spoken of) was not discontinued, and the cost on both sides paid out of the estate? I have stated the defendant's answer in considering the last preceding exception, and for the reasons there given must allow this exception also. This will also apply to the next eight exceptions (to 68 inclusive) taken to the answer to this interrogatory—the plaintiff interrogating the defendant particularly as to nine of the suits mentioned in the 133rd paragraph of the bill, and his answer being as above stated in exception 59.

69th Exception. The 134th interrogatory asks whether malice and wrong charged against him in the suit brought by Wentworth for malicious arrest, were not fully made out in evidence, and so found by the Court and jury? The defendant admits that the verdict was given against him in the suit, but denies that he was actuated by any malice in holding Wentworth to bail. Whether there was malice and wrong, or want of reasonable and probable cause on the part of the defendant, was a mixed question of law and fact, partly for the judge to determine, and partly for the jury, and I do not very well see how the defendant could be expected to answer more than the fact of this verdict being found against him, or how he can know whether the jury were fully satisfied or not, except by

their finding a verdict. The interrogatory is peculiar, and though I do not feel quite certain on the point, I think upon the whole that the exception must be overruled.

70th Exception. The 138th interrogatory inquires whether a certain property has not been renting for many years, at £130 per annum, or how otherwise, and whether the defendant has not been regularly receiving the rents. His answer is, that it was sometimes rented and sometimes idle, and that the accounts annexed to his answer show all the rents he has received from the property. It is almost unnecessary, after what has been already stated, to say that such an answer is insufficient. The defendant should have stated whether it did or did not rent for £130 per annum, and if not, for what sum it did rent, and for how many years, and he should either have admitted or denied that he had regularly received the rents. Hepburn v. Durand (1 Bro. C. C. 503).

71st Exception. It is admitted that the remainder of the 138th interrogatory, as to the ground rent claimed by the corporation, and the interest on the Rannay mortgage, is not answered.

72nd Exception. It is also admitted that part of the 139th interrogatory, whether a suit was not brought to recover the balance of the land from Mr. Wright, is not answered; but, it is said, defendant was not bound to answer, whether it appeared by his account and the voucher mentioned. The defendant answers that he cannot tell the amount of the law expenses, but they all appear in his account. I think he was bound to state the amount of expenses paid, and whether or not such sums appear in the accounts.

73rd Exception. The defendant's counsel contends that the defendant is not bound to answer the 140th interrogatory, which inquires whether the interest on money borrowed by the defendant did not amount to upwards of £2,600; that it is sufficient to state, as he has done, that the amount which he paid for interest will appear in his accounts filed in the Probate Court; and that the plaintiff can examine those accounts and ascertain the amount. Though perhaps the plaintiff could ascertain the amount paid by reference to the accounts, and could prove it in that way, he was not bound to do so; but had a right to the defendant's admission in order to avoid the necessity of proving it. There is no answer to the question how much he paid for interest. It is neither admitted nor denied that he paid £2,600.

74th Exception. The answer to the 141st interrogatory is insufficient, for the reasons stated in the preceding exception.

75th Exception. The 143rd interrogatory inquires whether defendant, in his accounts, does not charge the estate with the mortgages given by purchasers to secure balances of purchase money, as well as the acknowledging and recording thereof. The defendant's counsel contends that the plaintiff has no right to asks what appears in the defendant's accounts; but if he has the right, the answer is sufficient. I have no doubt either about the plaintiff's right to ask the question, or the sufficiency of the answer. The answer is, that the defendant's accounts will show all the instances in which he has charged the estate for mortgages given by purchasers of the real estate, or with the fees for acknowledging and recording. He should have stated distinctly and unequivocally whether he did or did not charge the estate as alleged.

76th Exception. Another part of this interrogatory asks whether such mortgages were not generally drawn by the defendant himself or by members of his own family? His answer is, "I cannot possibly tell by whom such mortgages were drawn." This is insufficient. As stated in Drewry's Equity Pleading, before referred to, "I cannot tell" may mean "I will not tell." He should have answered as to his information and belief.

77th Exception. The 144th interrogatory inquires whether the defendant did not make a common deed to the plaintiff of certain described land, drawn by his son, for an agreed value of £1,025, in order to vest the legal estate in the plaintiff, and for no other purpose? The object of this interrogatory seems to be to shew that the conveyance to the plaintiff was not a purchase by which a sum of money came into the defendant's hands, upon which he might be entitled to charge commission, but a mere transfer of the legal estate without any money being paid. Technichally the answer is insufficient, but I think defendant has answered it substantially. He says that the plaintiff was residing on a farm belonging to the estate, and deing desirous to obtain a deed of it, it was agreed that he ehould purchase at the sum of £1025, and that that sum should be charged to him as a payment in his account; that the deed was accordingly given to him, and the £1025 was credited to the estate as received, and was charged to plaintiff as a payment. That the deed was not a mere common deed, and it was drawn by one of the defendant's sons. Though this answer does not, in the words of the interrogatory, admit that the object of the deed was merely to vest the legal estate in the plaintiff, it does so in effect. It admits that it was agreed that the price of the farm should be charged to plaintiff as a payment, and credited to the estate as received, shewing that no money passed. The property belonged to the estate, the legal title being in

the defendant, and an equitable interest in the plaintiff, the plaintiff wanted to get the title, and it was agreed that he should have it for the sum stated. Though I am not quite satisfied that I should do so, under the circumstances, I shall overrule the exception.

78th Exception. I think the answer to that part of the 144th interrogatory which asks whether the defendant did not, on 20th April, 1858, charge the estate 23s. for drawing and acknowledging that deed, is substantially sufficient. Defendant admits that he did charge that sum to the estate for the deed, but he does not say whether or not it was on the 20th April, which strictly, he should either have admitted or denied. The material fact—the charge of 23s. for drawing that particular deed—is admitted. This exception is overruled.

79th Exception. In a part of this same interrogatory the defendant is asked whether he did not charge in his accounts five per cent. commission on the sum stated, as the consideration on the deed to the plaintiff, whereby he made a profit of £52 8s.? Though I think the defendant intended to admit that he had charged and been allowed five per cent. commission, he has not sufficiently answered the interrogatory,—he should have stated whether he did or did not make a profit of £52 8s. by the transaction. It may be said that it is a simple matter of calculation, which the plaintiff can readily ascertain; but the interrogatory is a proper one and he has a right to the defendant's answer. In Hepburn v. Durand (1 Bro. C. C. 503) where the exception was that the defendant had not set forth whether he had received particular sums of money specified in the bill—the answer referring to a schedule as containing an account of *all* sums received by the defendant, the Lord Chancellor held that the answer was insufficient,—that the defendant was bound to answer specifically to the specific charge in the bill.

80th Exception. It is admitted that there is no answer to that part of the 145th interrogatory inquiring about the bond from Flewelling & Reading.

81st Exception. In another part of the 145th interrogatory, the defendant is asked whether a certain voucher mentioned in the bill is anything more than the former mortgage of 1845, given up on receiving the Flewelling & Reading mortgage? I do not fully understand the question; but I cannot find that the defendant has attempted to answer it, or stated his inability to do so. The exception must, therefore, be allowed.

82nd Exception. In another part of the same interrogatory, referring to the transaction with Ranney and Flewelling & Reading, the

plaintiff asks the defendant whether, while increasing his receipts to £1,500, he either received a farthing on the transaction, or paid a farthing on the Rannay debt? It is contended by the defendant's counsel that his answer is sufficient, that it admits that he neither received nor paid any money on the transaction. If it does so, it is only by inference. There is no direct answer either admitting or denying the receipt of money, and, therefore, the answer is insufficient.

83rd Exception. Another part of the 145th interrogatory asks, whether the defendant did not charge and *actually obtain* another commission, *i. e.*, in addition to the five per cent., under the name of "horse and expenses" on the same transaction, thus profitting by it £78 1s. 9d.? The defendant says that a charge of £3 1s. 9d. for horse hire and expenses, *appears* in his accounts, that a charge of five per cent. commission on £1,500 *was allowed* him by the Judge of Probates, and will also appear in his accounts. I do not think the defendant intended to evade the question, but his answer is insufficient. He is asked if he did not *actually obtain* an allowance for horse hire, &c., he says the charge appears in his accounts, but does not state whether he received it. Neither does he answer directly whether he profitted by the transaction to the amount of £78 1s. 9d., though, as he states, that the Judge of Probates allowed him five per cent. commission on £1,500, if his answer as to the horse hire, &c., had been as full, it might have been sufficient. As it is, I must allow the exception.

84th Exception. It is admitted, that if the 146th interrogatory was a proper one, it is not answered. It enquires, whether the defendant has not charged in his accounts, and been allowed by the decree of the Probate Court, large sums of money for commissions on the receipt of the trust-monies, for sales of land and otherwise, the equitable assets of the estate, and in which the Probate Court has no cognizance, amounting to £2,433—or how otherwise? The defendant says that he did charge, and was allowed, by the decree of the Probate Court, commissions on monies received for the sale of lands of Hendricks, but he does not state the amount; and he submits that the Probate Court had power to make the decree, and that his accounts have been finaly closed thereby. I see no objection to any part of the interrogatory, unless it be that part which denies that, rather than enquires whether, the Probate Court had jurisdiction. If this is to be considered as a part of the question, it was one of law which the defendant need not have answered—(Daniell's Pr);—but he has answered it, by stating his opnion that the Probate Court had jurisdiction to make the decree.

85 Exception. The inteorrogatory 146*a*, enquires, wheth defendant has not *wrongfully* charged, in his general account in the Probate Court in March, 1844, the accounts of each of t visees with him, largely made up of his store account, and hac allowed without voucher or proof, by a decree wrongfully and sively obtained, as stated in the 44th paragraph of the bill, in paragraph the plaintiff charges that the defendant, Chas. Jol fraudulently concocted an agreement, in order that the ac might be passed. The answer is—"I did, in said accounts a "appear on reference thereto, charge my accounts for paymen "advances made to each of said devisees—my store accounts f "very small items therein. * * * They were passed and allow "the decree aforementioned, and with the full knowledge and "of the attorney for the plaintiff and the other devisees. * * * "that such decree was wrongfully and collusively obtained." defendant has not answered, whether his accounts against the sees were allowed without voucher or proof, and so far the a is insufficient. He admits that he charged these accounts in h eral acconnt with the estate. I doubt whether he was bound whether he *wrongfully* made the charges or not. It would b cient for the plaintiff's purpose to show the fact that such ac were included in the defendant's accounts, as executor passed Probate Court. It is sufficient, however, to say that the ans defective.

86th Exception. The 147th interrogatory inquires, wheth defendant did not, as appears by his accounts and vouchers, fully and improperly, and in breach of his trust, pay Stephen S a legacy of £500 out of the funds of the real estate, or out funds of the personal estate, which funds were required to p debts due by the estate, and when there were no proper funds able to pay such legacy. The defendant says that he did, at th mentioned, pay the legacy, and that he paid it out of the g funds of the estate. He denies that it was a wrongful or im payment. This answer is insufficient, for not stating whet paid it out of the real or personal estate, as he was particula terrogated. Though it is not very clearly stated, I think it n considered as part of the interrogatory, whether the funds, which he paid the legacy, were not required to pay the debt the defendant should have answered it. By the will of Mr dricks, the legacy was only payable out of the personal esta the plaintiff had a right to a distinct answer from the defen out of what fund he paid it, and whether, when he paid it was sufficient personal estate to pay the debts.

87th Exception. The defendant has not answered the 155th interrogatory, which asks, whether he did not early possess himself of the trust property, rents and profits, and whether he did not dispose thereof, and receive. or wrongfully lose, or otherwise convert, an amount sufficient to pay the debts two or three times over, or some other and what amount? He admits that he did possess himself of the property, rents and profits, as soon as he conveniently could, and that he has sold a good deal of the estate, but he denies that he converted the proceeds to his own use, misapplied or negligently lost them; that his accounts, before referred to, show what property he has sold, and all the proceeds that he has received. He does not, as he should have done, answer whether he received an amount sufficient to pay the debts, or what amount he did receive. It is almost unnecessary to repeat again, that it is no answer to such an inquiry as this, to refer the plaintiff to the accounts as containing *all* that the defendant received. Hepburn *v.* Durand (1 Bro. C. C., 503).

88th Exception. The 157th interrogatory inquires, whether, from having no money provided according to the will, the plaintiff has not been compelled, in order to escape want and suffering, to purchase for his family wants, at the defendant's store at very high country prices? It is contended that the defendant was not bound to answer this interrogatory; but if he was it is sufficiently answered. The defendant certainly might have answered differently. He should either have admitted, denied or ignored, the charge of the plaintiff. being compelled by want to purchase goods from him. It would not seem to be very material whether the plaintiff purchased goods from the defendant or not. If it was intended as part of the interrogatory to ask, whether defendant neglected to provide the plaintiff with money according to the terms of the will, it is not very clearly put. Though I have a good deal of doubt about it, I think upon the whole that the answer is insufficient.

89th Exception. Another part of the interrogatory inquires whether the defendant's breaches of trust, in not vesting money for the plaintiff's use, according to the will, have not operated advantageously for the defendant and injuriously to the plaintiff. The defendant gives no answer whatever to this, The exception must be allowed.

90th Exception. The 167th interrogatory inquires, whether the defendant is in circumstances to meet or pay any considerable sum of money, which, upon taking acccounts in this suit, he may be found indebted to the estate and ordered to pay in consequence of his trusteeship, and for any and every liability, default and breach of trust which may be found against him. The only answer that appears to

be given to this, is a denial by the plaintiff that he is indebted to the estate in many thousands of pounds, as stated in the bill; but he denies the plaintiff's right to interrogate him as to his private affairs, and submits that he is not bound to answer any such questions. It is contended, also, that the interrogatory is altogther hypothetical, and therefore the defendant is not bound to answer it. In order to answer it, the defendant would be required to admit or assume that a decree will be made against him, which, I think, he is not bound to do. Interrogatories are founded upon allegations in the bill, and these are generally statements of facts. I am not aware of any case where a defendant has been required to answer questions relating to a supposed state of facts, which may never come into existence. A defendant is only required to answer as to matters which are *well* pleaded, that is, to the *facts* stated and charged. (Daniell's Pr., 3rd ed., 586). I therefore overrule this exception.

91st Exception. Another part of the 167th interrogatory asks, whether the defendant is not much pressed for money, and greatly embarrassed in his circumstances. The defendant denies the plaintiff's right to put this question. It is contended that the plaintiff is only entitled to such discovery as will enable the Court to make a decree against him—Daniell's Pr., 3rd ed., 584)—and that whether the defendant is insolvent or not cannot affect the decree in this suit. In general a plaintiff will not be allowed, because he has a claim against a defendant, to investigate his private affairs. Francis *v.* Wigzell, (1 Mad. 258). That was a suit for specific performance of an agreement by husband and wife to purchase an estate, and it was held that the vendor had no right to interrogate the wife as to her separate property; and it is said, in Daniell's Pr. (3rd ed.) 585, referring to this case, that in order to entitle a plaintiff to an answer to such an inquiry, he must shew some specific lien on the defendant's property, and pray some relief respecting it. I infer, from what is said in that case, that if it had appeared that the wife had separate property, and had power to contract, and had made her separate property liable, the question might have been asked. In Wigram on Discovery, 166, it is said, that in determining whether particular discovery is *material* or not, the Court will exercise a discretion in refusing to enforce it, *where it is remote in its bearings* upon the real point in issue, and would be an oppressive inquisition. And in page 170, in speaking of the same point, he says—"The word '*mate*-"*rial*' is exclusively relative to the case made and the relief prayed "by the bill. Now the argument upon the materiality of a given "question arises for the most part upon exceptions to the answer in "the ordinary way. In the stage of the cause in which these ques—

"tions arise, the *case made* and the *relief prayed* by the bill, are the "*only* tests by reference to which we can judge of its materiality." The case made by this bill is, that the defendant has lost, wasted and misappropriated large sums of the trust-moneys—that he has mixed them up with his own private funds and used them as his own—that the remainder of the property is in danger of being lost—that he is largely indebted to the estate and not in circumstances to pay, the most valuable part of his property being mortgaged; and the *relief* prayed is *(inter alia)* that he be removed from the office of trustee under the will, and that a receiver be appointed. The facts charged in the bill, if established, will be sufficient to authorize the appointment of a receiver,—Lewin on Trusts, 661, Story's Eq. Jur., § 836,—and therefore it would seem to be a material question whether the defendant's pecuniary circumstances are such as to induce the Court to think, that a due regard to the interests of the *cestui que trust* requires that the control of the funds should be taken out of his hands, and that another person should be appointed in his place. Applying the test of materiality, as stated by Mr. Wigram, it seems to me that the discovery sought, as to the defendant's pecuniary circumstances, is not remote in its bearings upon an important question in this cause; that it is a material fact to be established in order to make out the plaintiff's right to that part of the relief prayed, and therefore the defendant ought to answer the interrogatory. This will also apply to the 22nd exception which refers to the defendant's refusal to answer the inquiry about the mortgages. This exception must also be allowed.

The result is, that all the exceptions (except the 13th, 19th, 69th, 77th, 78th, and 90th) are allowed, and that those six exceptions be overruled; that the costs of the exceptions allowed be taxed to the plaintiff, and of those overruled, to the defendant; that the Clerk deduct the costs so taxed to the defendant from those taxed to the plaintiff, and certify the balance, and that the defendant do pay to the plaintiff, or his solicitor, the balance so certified. That the defendant put in a further answer within thirty days after service of the order of the Court. I have gone carefully through this case and endeavored to apply properly the rules and practice of the Court of Equity. If, in some instances, I have allowed exceptions to the defendant's answers, which might appear to be substantially sufficient, I did so because I considered that the practice with regard to answering interrogatories was well settled, and with few exceptions, easy to be complied with, and ought not to be departed from. If, on the other hand, I have overruled exceptions which, by the application of the established rules, I ought perhaps to have allowed, it

will be found, I think, to be only in those cases where the interrogatories were comparatively unimportant. Probably not quite the same degree of strictness is required in answering interrogatories now, as was required before the Act 17 Vict., c. 18, which authorizes a *viva voce* examination of the defendant, though I am aware a plaintiff cannot obtain the same benefit from such an examination that he can from interrogatories, where he can cross-examine the defendant, put almost any kind of leading question and sifting inquiry, and, as was once said, "scrape the defendant's conscience." According to the present English practice, the plaintiff can cross-examine the defendant on his answer. I will take this opportunity of stating that my short experience on the Bench has satisfied me that no benefit has resulted from the abolition of the Court of Chancery, and making the Judges of the Supreme Court Judges in Equity. It would be more for the interests of suitors in the Court, that their cases should be heard and determined by a Judge, who could devote his whole time to the consideration of the rules and principles which govern Courts of Equity, and whose time and attention would not be taken up to a considerable extent, by the trifling matters which the Judges of the Supreme Court are frequently called upon to consider and decide—occupying as much time as matters of greater importance.

JOHNSTON *v.* McCARTNEY and others.

A, the father, and B and C, his sons, being joint owners of two lots of land, mortgaged them to the plaintiff. A afterwards conveyed to the plaintiff land of which he was sole owner, in payment of half the mortgage debt, and then released all his interest in the mortgaged lands to B and C, who occupied the land in common for several years, and made several joint payments to the mortgagee on account of the mortgage debt. B and C afterwards divided the land equally between them by deed of partition. In a suit for foreclosure of the mortgage, B claimed that as between himself and C, his portion of the land had been released by the mortgagee at the time A conveyed the land to him, and that C's lot should be first sold to satisfy the mortgage.

Held, 1st, That in the absence of any written agreement by the mortgagee, the whole of the land remained equally liable to the mortgage, and should be sold in one lot. 2nd, That if a verbal agreement, and the appropriation of the payment by A, would be sufficient to release a particular part of the mortgaged lands, it would not bind C who was no party to it. 3rd, That the subsequent partition of the land between B and C, in ignorance by the latter of the agreement by which the portion of the land allotted to B was to be released from the mortgage was a fraud upon C, and that such agreement would not be carried out for B's benefit.

This case came before the Court in exceptions to the Barrister's report made on a reference on a foreclosure suit. The facts are fully stated in the judgment of the Court. At the last October Sittings,

J. M. Robinson moved to confirm the report.

S. R. Thomson, Q. C., and *Fraser* were heard on behalf of James McCartney, and

Gregory for Andrew McCartney and Edward McCartney and wife.

ALLEN, J., now delivered judgment.

The facts of the case are, that the defendants, Andrew McCartney, the father, and James and Edward McCartney, his sons, being the joint owners of two adjoining lots of land in Maugerville, mortgaged them to the late Hugh Johnston on the 12th October, 1847, to secure the payment of £530 and interest. On the 12th July, 1851, Andrew McCartney conveyed to the plaintiff, Hugh B. Johnston, who had become the owner of the mortgage, a lot of land in Gagetown for the consideration of £275, which was agreed to be taken as a payment on account of the mortgage. After the mortgage was given, the defendants, James and Edward McCartney, lived on the land, working the farm jointly, and occupying the same house about two years. They then agreed to divide the land—James to take the upper lot and Edward the lower—and Edward built a house upon his portion. They appear to have continued to occupy the land in common till about 1862, when they ran a division line between their lots, and each then occupied his own portion. Soon after this, Andrew McCartney conveyed all his right and interest in the land to James and Edward, and they executed a deed of partition in accordance with the division they had previously made. Several payments were made on the mortgage by James and Edward jointly after the conveyance of the Gagetown property. After the execution of the deed of partition, James gave three several mortgages on his lot to the defendants John Carr, Robert P. Smyth, and John Anderson. All these deeds are duly registered. The Barrister has reported the sum of £353 14s. 5d., due the plaintiff on the mortgage, and has found that the payment of £275—the price of the Gagetown lot—was made by Andrew McCartney and accepted by the plaintiff, Hugh B. Johnston, on the terms that the same was to be applied specially on account of the lower lot included in the mortgage, and has recommended that the upper lot should be first sold and the proceeds applied towards paying off the mortgage, and if insufficient, then that so much of the lower lot as might be necessary, should be sold. To this recommendation about the sale, the defendant, James McCartney, has excepted, contending that both lots are equally liable. The question only concerns the defendants; and what I have to decide is, whether there is evidence to support the finding of the Barrister; and in order to do this, it will be necessary to refer to parts of the pleadings, and the evidence given on the reference. In the 13th

paragraph of the answer of the defendants, Andrew and Edward McCartney, they state that Andrew McCartney agreed with the plaintiff, Hugh B. Johnston, to convey to him the Gagetown lot "in "payment and full satisfaction of and for the lower lot or half of "the said mortgaged premises, and did, by virtue of such agreement, "in or about the month of June, 1854, convey to the said Hugh B. "Johnston, the said land as of equal value, and in full payment "and satisfaction of the lower lot of the said mortgaged land and "premises, and the said Hugh B. Johnston so took and received the "said lands and premises and conveyance thereof." In answer to an interrogatory put to him by the defendants (Andrew and Edward) on this point, Hugh B. Johnston says, that on or about the 12th July, 1851, Andrew McCartney conveyed to him the Gagetown lot at and for one half the amount of the mortgage, but he has no recollection of the conveyance having been given or received on account of, or for or in full payment and satisfaction of any particular portion of the mortgaged premises, or of any such agreement having been made with regard to such conveyance; on the contrary, he says he always understood and believed that the whole of the mortgaged lands are still liable for the payment of the balances remaining due on the mortgage. In his examination before the Barrister, Andrew McCartney says that the Gagetown lot was to be in payment for the Maugerville lot—that it was to be credited in the lower lot—but that nothing was said of any release to be given of the lower lot. Though Edward McCartney joined in the answer with his father, stating the terms on which the Gagetown property was conveyed, he does not seem, by his examination before the Barrister, to have any personal knowledge of the alleged agreement. He states that "Hugh B. "Johnston was at Maugerville about 1851, before my father sold to "him. My father asked him if he would take the Gagetown prop-"erty in payment of one lot—he said he would do so, but no par-"ticular lot was mentioned." This clearly was nothing more than conversation—a mere proposal, not amounting to an agreement. What he (Edward) afterwards says about its being in payment for the lower lot, is only what his father told him. James McCartney states that Johnston told him the Gagetown property was to be in payment of one lot of the land, but did not say which lot. In another part of his evidence he says he knew from Hugh Johnston that his father (Andrew) had sold the Gagetown property for one lot of the land, though he did not at the time know for which lot, nor did he know at the time of his examination. Immediately afterwards he added, that Johnston told him it was a payment on the whole land. The only other evidence relating to this payment, is the receipt signed by Hugh B. Johnston, dated September 20, 1864, in

which he acknowledges to have received from Andrew McCartney £250 for one lot sold to him by the late Hugh Johnston.

In considering this case, three questions arise,—1st. Whether there is sufficient evidence of the agreement as contended for by the two defendants. 2. If there was such an agreement, whether James McCartney, not being a party to it, is bound by it; and 3rd, Whether such an agreement would not be void under the Statute of Frauds. On all these questions my opinion is against the view taken by the learned barrister. As to the first question—it seems to me very improbable that if Mr. Johnston had agreed to release one of the lots, there should have been no writing signed by him, or no endorsement on the bond or mortgage, to shew his intention. Mr. Johnston, being a barrister, may I think be presumed to have known that no portion of the land could be released from the mortgage except by an instrument of equal solemnity, duly registered, or at all events, not by a mere verbal agreement. But a release, according to Andrew McCartney's own evidence, was not spoken of. To talk to a man possessing any legal knowlege, of releasing a part of the mortgaged land, by crediting a payment on that part, is simply absurd. It is somewhat singular that, though receipts were produced for all the other payments, there was none for this, (given at the time, I mean), the largest and most important of them. So, the fact of the brothers having continued to pay upon the mortgage jointly, and settling with Mr. Robinson, the executor of Hugh Johnston, without any mention by Edward of his lot having been released from the mortgage, and the conveyance by Andrew McCartney of his interest to James and Edward, all seem to me to be inconsistent with such an agreement having been made. If Edward's lot was released from the mortgage in 1851, why should he contiuue year after year to make payments upon it? Why not inform his brother that his lot only was liable, and that he must pay the mortgage? But according to the evidence of James he never heard, either from his father or brother, till this suit was commenced, that his (James') lot was to bear the whole mortgage money. The receipt given by the plaintiff was relied on as proving the agreement. But in addition to the fact that no particular lot is therein specified, the receipt was signed in Fredericton more than thirteen years after the transaction took place, without any opportunity for Mr. Johnston to refer to his papers, and apparently without much consideration. Had he been asked about it in the interrogatories filed by the defendants, he might have given some explanation, but nothing was said about it till it was produced before the barrister on the examination, at which Mr. Johnston does not appear to have been present. Considering the circumstances under which this receipt was given, it is not entitled to much weight, op-

posed, as it is, to Mr. Johnston's answer under oath. The conclusion I should come to upon the whole evidence is, that Mr. Johnston has stated the agreement correctly in his answer, viz., that he agreed to take the Gagetown property as half the amount of the mortgage, without reference to any particular portion of the land, but generally on the whole. 2nd. Assuming that a verbal agreement would be sufficient, was it not necessary that James and Edward McCartney should be parties to it? Andrew McCartney was only the owner of an undivided third of the two lots, and it is difficult to see how he could do any act to bind the rights of the other part owners. It is contended, however, that as the money was his own, he had a right to appropriate the payment to the lower lot, and that the other mortgagors are not injured by it, and have no right to complain of it. Without disputing that this might be so, it is not so much the right to appropriate the payment that is complained of, (though it is not by any means admitted) as the partition of the land with James in ignorance of the alleged agreement, whereby the burthen of the mortgage is sought to be thrown on his lot. That James and Edward contemplated an equal division of the land between them from the first, is quite evident from the evidence both of Andrew and Edward McCartney. Edward says, "In 1847, in the autumn, my brother "and I went into possession; we lived in the old house. In 1849 I "built a house. My brother suggested the place on the lower lot. "When I built the house, he agreed that I should have the lower lot "and he the upper." Andrew McCartney says, "At the time I gave "the deed to Mr. Johnston, the boys (*i. e.* James and Edward) in-"tended to divide in the way they afterwards did." Thus it appears that about two years before the conveyance of the Gagetown property, and the making of the alleged agreement, these brothers, knowing probably the intention of their father to give them his share of the property, had agreed to make an equal division of the whole. Can it then be supposed that James, when by the deed from his father he became the owner of an undivided half the land, would, without receiving any equivalent or consideration, have executed a deed of partition with his brother, giving him that half which was exonerated from the payment of the mortgage? Equality of partition appears also to have been intended by the father as well as the sons. Andrew McCartney shewed this when he conveyed his share to his two sons knowing, as he did, some years before, that they had agreed to divide the land equally. He says in his evidence—"I gave the deed to James as well as Edward, not to be partial to either." If then, by an arrangement between the father and Edward, the lot which the brothers had agreed should be Edward's could be exonerated from the mortgage, and James, in ignorance of such arrange-

ment, was induced to execute this partition deed, it would be a fraud upon him, and the parties to such fraud could not expect the aid of this Court to carry out their intention. That James was ignorant of any arrangement by which the payment of the mortgage was intended to be thrown upon his lot alone, appears by his own evidence, which is not contradicted by either his father or Edward. 3rd. To give effect to such an agreement would be contrary to the provisions of the Statute of Frauds. It is set up as an agreement between Andrew McCartney and the plaintiff, by which the latter released one lot of the mortgaged premises from the incumbrance. But I think there is no evidence of any such agreement even verbally, and certainly none in writing, the specific performance of which could have been enforced by McCartney. If the defendants cannot make out such an agreement in fact, and shew that it is binding, they have nothing to stand upon, for it is only by virtue of such agreement that James McCartney's lot is to be made primarily liable for the payment of the mortgage. A question somewhat similar to this arose in the case of Robinson and Gee, (1 Ves. 261). There A, tenant in tail, remainder to his brother B in tail with other remainders, wanting to raise money to pay debts on his estate, proposed to B to join in a mortgage, which was done, and both joined in a bond, but A received the money. The remainder being vested in possession in B, on the death of A, his creditors brought a suit to turn the mortgage debt on the real estate of B, and to exonerate the personal estate of A. Parol evidence was offered of an agreement between the brothers that the debt should rest entirely on B's estate; but Lord Hardwick was of opinion that such evidence could not be admitted. And in Stevens v. Cooper, (1 John. Ch. R. 425), cited in the note to the American ed. of Powell on Mortgages, 149, it is said —where several lots of land are mortgaged, the mortgagor or purchaser under him cannot set up a parol agreement made at the time of the mortgage, that in case the mortgagor should sell either of the lots, the mortgagee would release such lot from the mortgage on being paid a certain sum per acre by the purchaser. It would also be contrary to the policy of our Registry Act to uphold such an agreement. It would not only be allowing a conveyance of an interest in lands to be made by words only, but also allowing such verbal conveyance to defeat a *bona fide* registered deed. It would be a fraud upon the three defendants who claim under the mortgages given by James McCartney. They would find, by searching the records of the County, that in 1847, Andrew, James and Edward McCartney were the owners of a farm, subject to a mortgage; that some years after Andrew conveyed his interest to James and Edward, and that they divided the land equally between them; they would

find nothing on the records to shew that the liability which attached by the mortgage on the whole of the land was altered in any way, and neither they nor James McCartney, under whom they claim, have the slightest notice of any other deed, writing, or agreement of any kind affecting the property; they advance their money on the faith of the public records and their knowledge of the value of James' share of the land, subject to the payment of half the mortgage debt; and it would be monstrous if they were to be told that their mortgages were useless because there was a private arrangement between the mortgagee and one of the mortgagors, (not the one under whom they claim), that the whole burthen of the mortgage was thrown on that portion of the land which was conveyed to them. For these reasons I am of opinion that the exceptions to the barrister's report must be allowed. I have not referred to one fact stated in the evidence, viz., that Andrew McCartney and his wife lived with and were maintained by Edward. There was nothing to shew any agreement about it, or that Andrew intended to convey his share of the land to Edward in consideration of maintenance, and I did not think the case was affected by it. There is another circumstance. In the answers of Andrew and Edward McCartney, they state the conveyance of the Gagetown property to have been made to Johnston in June 1854. The barrister's report, and all the evidence, stated the date of the deed to be 12th July 1851. This may have been an oversight on the defendant's part, or it may have been so stated to get rid of any supposed effect of the three joint payments of £20, £35, and £75, made in May 1852, 3 and 4, respectively.

Decree, that so much of the barrister's report as states the sum of £353 14s. 5d. to be due to the plaintiff, for principal and interest, on the 26th June last, and recommends a sale of the mortgaged premises, be confirmed; but as to so much of the report as recommends that such sale be made in two lots, and that the lot lying to the northwest of a certain dividing line, running from the River Saint John to the rear of the lots, be first sold and the proceeds applied, &c., be disallowed. That a sale of the whole of the mortgaged premises be made under the direction of Mr. Jack and proceeds applied towards the payment of the said sum of £353 14s. 5d., and the subsequent interest and costs.

JOHNSTON *v.* McCARTNEY and others.

In general, payment of costs between co-defendants is not directly ordered; but the plaintiff is ordered to pay the costs to the defendant to whom they are decreed, and to add them to the general costs in the cause and recover them from the other defendants.

Fraser, on behalf of the defendant, James McCartney, moved on the 8th December for costs on the exceptions to the Barrister's report in the case. (See *ante page 220.*)

Gregory, for the defendant's, Andrew McCartney and Edward McCartney, opposed the motion.

H. B. Rainsford appeared for the plaintiff.

Cur. adv. vult.

ALLEN, J. (11th Dec.) said that the Court would not, except in certain cases, not applicable here, directly make an order for the payment of costs between co-defendants; but that object was indirectly attained by ordering the costs of one defendant to be paid by the plaintiff, and received back by him from another defendant. Cliff *v.* Wadsworth (7 Jur. 1,008, s. c. 2 Y. & Col. 598); Blenkinsopp *v.* Blenkinsopp (12 Beav. 588); Morgan's Costs, 87. The order would be, that the costs of the exceptions to the Barrister's report, and the costs of the examination of witnesses and proceedings before the Barrister, arising out of the claim of the defendants, Andrew McCartney and Edward McCartney, to exempt that portion of the land claimed by Edward McCartney from the payment of the mortgage, be taxed by the Clerk, and paid by the plaintiff to the defendant, James McCartney; and that the amount of such costs be repaid to the plaintiff by the defendants, Andrew McCartney and Edward McCartney, within twenty days after demand and service of this order, and be recovered from them by the plaintiff in addition to and separate and apart from the general costs in the cause.

THE BANK OF NEW BRUNSWICK *v.* CRONK and others.

JANUARY 5, 1867.

In a suit for foreclosure of a mortgage, by which the mortgagor, in addition to other property conveyed, assigned a mortgage given to him by M., the plaintiff is not entitled to recover the costs incurred by him in defending a suit for redemption brought against him by the assignee of the redemption of M., in which suit each party was ordered to pay his own costs.

H. B. Rainsford, at the November sittings, moved to make absolute an order *nisi* to confirm the report of the Barrister in this cause. The facts are fully stated in the judgment of the Court.

Cur. adv. vult.

ALLEN, J., now delivered judgment.

This was a suit for foreclosure of a mortgage give to the plaintiffs by James Travis on the 20th December, 1849, to secure the payment of £2,795, and interest. The mortgage, as set out in the bill, recites a mortgage given by one James McGregor to the said James Travis in September, 1846, to secure the payment of £425 in ten years, with interest. The mortgage from Travis to the plaintiffs conveyed several lots of land, and also assigned the mortgage given to him by McGregor. The several defendants claim, either as subsequent mortgagees from Travis, or as purchasers of his equity of redemption in parts of the land, their exact interests not being material. The bill alleges that by a suit brought by William Livingston, who was the assignee of the equity of redemption of that part of the land described in the mortgage from McGregor to Travis, against the plaintiffs and Travis, the McGregor mortgage was redeemed; that Travis having been for a certain time in possession of the lands included in the McGregor mortgage, and received the rents and profits thereof, a large amount was charged therefor against the plaintiffs as the assignees of the mortgage, and a large amount of money was necessarily expended by them in defending the suit, and in the reference arising therefrom. The report of the Barrister in the present case states that in May 1853 Livingston paid to the plaintiffs $10,279.15, the amount claimed by them as due on the McGregor mortgage, under protest that such amount was not due; that by the decree in the suit of Livingston against the plaintiffs, it was ordered that the plaintiffs should pay to Livingston £694 2s 10d. overpaid to them on said mortgage, with £437 6s. interest, making in all £1,131 8s. 10d., which sum they paid to Livingston; that in defence of that suit the plaintiffs incurred and paid certain costs, amounting to $2,337.62; and the Barrister has allowed the plaintiffs the amount which they paid to Livingston. and the costs incurred, together with interest to the date of the report, the costs and interest amounting to $2,526.85. There was no argument before me on the motion to confirm the Barrister's report, and no authority cited to shew that the plaintiffs were entitled to recover, in this suit, costs which they incurred in another suit relating to a part of the same property. It may be that a mortgagee is entitled to recover all costs incurred in ascertaining or defending his rights; but whether this will entitle him to recover the costs of a suit in which he was unsuccessful, I am not prepared to say. The plaintiffs, in the suit brought against them by Livingston to redeem the McGregor mortgage, were unsuccessful, and consequently were refused costs, contrary to the ordinary rule in suits to redeem: each party being ordered to pay his own costs. It would seem now, by the schedule to the Barrister's report, that he has allowed them not only the costs of their own solicitor and

l in that suit, but also the costs of Livingston's solicitor, and ount paid the Barrister to whom it was referred to take the t in that case, which I should suppose would be paid by the ff, Livingston.

ıst confess that I am not very competent to decide questions ty practice; but I have not been able to satisfy myself as to intiff's right to these costs. The order therefore will be that ort be confirmed, except as to so much as recommends the nce of the costs and interest thereon, $2,526.85, and that the ged premises be sold under the direction of Mr. Jack for pay- f the balance, subsequent interest, and costs. As the amount costs claimed is large, and the question an important one, it a very proper case for appeal, and I should much prefer that intiffs should take that course, than abide by my decision of tter.

WIGGINS and others v. FLOYD.

APRIL 2, 1867.

t for foreclosure of a mortgage in fee, after the death of the mortgagee, the ust show in whom the legal estate is vested. Alleging that the plaintiff is tor and trustee of the mortgagee is not sufficient.

n A. *Wright* moved to take the bill in this case *pro confesso* nt of appearance. The suit was brought for the foreclosure of tgage in fee given by Oliver Barberie to Stephen Wiggins, ed, the defendant having become the owner of the equity of ption. The bill alleged that Stephen Wiggins died on the May, 1863, leaving a will, and thereby appointed the plaintiffs ecutors and trustees; that probate of the will was granted to and they took upon themselves the execution of the trusts.

EN, J.—It does not appear in whom the legal estate of the ged premises is. Describing the plaintiffs as "trustees" is not —they may be merely trustees of the personal estate. If the ged lands were devised to the plaintiffs by Stephen Wiggins, t to be so stated in the bill; if they were not devised, the Stephen Wiggins should be added as plaintiffs. This case nd over, with leave to the plaintiffs to apply to amend their y may be advised.

WALLACE and WIFE *v.* WOODS.

APRI

In a suit to obtain payment of a legacy; *quære*, whether, if the bill shews t estate insufficient for payment of the debts, it must not also shew that was charged on the land, if the plaintiff seeks payment therefrom.

The bill in this case was filed against the defendant, as trator *cum testamento annexo*, of John Woods, deceased, payment of a legacy bequeathed to the female plaintiff. stated that John Woods, by his will, devised and bequeath property to the defendant, he paying all the testator's le that he bequeathed a legacy of £25 to the plaintiff, whic paid; and that the testator's debts exceeded the personal e it prayed that an account might be taken of the testator's of the personal estate come to the defendant's hand, and estate might be administered in this Court.

John A. Wright now moved to take the bill *pro confesso* of an appearance.

ALLEN, J., said, the plaintiff could have a reference to inq the debts and personal estate; but if the object of the su have the legacy paid out of the real estate, he did not t plaintiff had shewn any right to it, as it did not appear b that the legacy was charged on the land; and it did not a the testator's debts exceeded the personal estate left, the legacy could only be paid out of the land. The case mi over, and the plaintiff could apply again if he thought it

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BYERS *v.* HARRIGAN and HOWE.

APRI

Where one of the persons named as defendants in a suit had died before t issued, the pleadings were amended by striking out his name, and the re-sworn.

On motion to take the bill *pro confesso* in this case agai fendant, Michael Harrigan, it appeared that the summons on the 17th October, 1866, against Catherine Harrigan Harrigan and John Howe. The suit was brought for the f of a mortgage given to the plaintiff by Catherine Harriga chael Harrigan; and the defendant Howe was a second n The bill stated that Catherine Harrigan had only a life est property, and that she died after giving the second mor the plaintiff was not aware of her death till after the c

ment of the suit. The defendant Howe had answered. The case stood over until this day in order that the pleadings might be amended.

H. B. Rainsford now moved to amend, and produced an affidavit stating that Catherine Harrigan died in March, 1865.

ALLEN, J., directed that the summons, bill and interrogatories should be amended by striking out the name of Catherine Harrigan as defendant, and amending the bill and interrogatories by stating the time of her death; also, that the defendant Howe should have leave to take his answer off file, and amend the title by striking out the name of Catherine Harrigan, and re-swear and re-file it.

WRIGHT *v.* EVANSON.

APRIL 2, 1867.

Where an amendment was made in a foreclosure suit, by adding plaintiffs after the filing of the bill, the defendant was allowed a month to answer after service of the order to amend, and of a copy of the amended bill.

The bill in this case was filed by Eliza Wright and William M. Wright, executrix, &c., of William Wright, deceased, for the foreclosure of a mortgage made by the defendant to the said William Wright and Ward Chipman, and the survivor of them, his heirs, &c., as trustees in a marriage settlement of one Mary Armstrong. William Wright, who was the surviving trustee, died in 1865, leaving several children, in whom the legal estate in the mortgaged premises vested. An order *nisi* had been made to amend the summons and bill, by adding the names of the several children of William Wright as plaintiffs, and alleging, in the bill, that on the death of William Wright the legal estate in the premises became vested in them. A copy of the order was directed to be served upon the defendant fourteen days before the sitting of this Court.

Kaye, for the defendant, now contended that he was entitled to the same time to appear after service of the order *nisi*, as if he had then been served with the summons, it being, in fact, a new cause, 17 Vict., c. 18, § 4. If proper parties had been made plaintiffs at first, defendant might have settled the suit.

John A. Wright, contra.

ALLEN, J., said, that as the summons served on the defendant

stated the date of mortgage, the parties between whom it was made, and the amount claimed, as directed by the Act 26 Vict., c. 16, § 4, there could be no pretence that the defendant was misled by the heirs of Wright not being made plaintiffs, and that substantial justice would be done by allowing him a month to appear and answer. It was ordered that the summons and bill should be amended as proposed, and that the defendant should have a month to answer after service of the order to amend and of a copy of the amended bill and interrogatories.

GODFREY *v.* OGLESBY.

MAY 11, 1867.

A defendant is entitled to a month to answer after the filing of the bill; and notice of motion to take the bill *pro confesso* cannot be given till the expiration of that time, though a copy of the bill and interrogatories may have been served on the defendant more than a month before the notice.

Straton moved to take the bill *pro confesso* for want of answer. A copy of the Bill and interrogatories had been served on the defendant's solicitor on the 19th March last, and notice of this motion on the 19th April. The bill and interrogatories were filed on the 1st April.

ALLEN, J., referring to the Act 17 Vict.. c. 18, § 4 and 7, said that the bill ought to be filed before the copy was served, and that the defendant was entitled to a month to answer after the bill was filed. The notice of motion to take the bill *pro confesso* could not be given until the defendant was in default for not answering. This notice was consequently given too soon, and the motion must be refused.

In re HUNTER.

AUGUST 6, 1867.

In an application to put an administration bond in suit, the Court will not determine whether there has been a breach of the bond. If the applicant makes out a *prima facie* case of breach, and that he is a proper person to sue for it, he is entitled to an assignment.

An assignment will not be refused though there is a variance between the bond and the form given by the Act.

The counsel moving for the assignment is not bound to shew that he is authorised to make the application.

It is sufficient to shew the substance of the proceedings against the administrator in the Probate Court without producing a copy of them.

Jack, Q. C., moved for an order to put the administration bond in this estate in suit, on the several grounds hereinafter stated.

S. R. Thomson, Q. C., opposed the motion.

ALLEN, J., now delivered judgment.

This was an application on behalf of Henry Fernie and William J. Fernie, judgment creditors of the deceased, for an order under the Revised Statutes, c. 136, § 50, to put the administration bond in suit on the following grounds:—1st. That the administrator, Francis D. Hunter, had not filed any inventory of the estate. 2nd. That he had not rendered a just and true account of his administration, and administered the estate according to law. 3rd. That he had not paid the costs of proceedings in the Probate Court ordered to be paid out of the estate, in consequence of a citation issued requiring him to file an inventory and account. The application was opposed by Robert Hunter, one of the sureties in the administration bond, on the grounds: 1st. That it did not appear that Messrs. Fernie had authorized the application to be made. 2nd. That the condition of the bond given, varied from the form prescribed by the Act, (1 Rev. Stat. 358). 3rd. That no devastavit was shewn, and that the administrator should have been sued on the judgment recovered against the deceased. 4th. That non-payment of the costs awarded by the Probate Court was not a breach of the condition of the bond. 5th. If such non-payment was a breach, it had been satisfied by taking the administrator in execution for the costs; and 6th. That a copy of the proceedings of the Probate Court on the citation issued against the administrator should have been produced.

As to the first objection—I think where a counsel makes a motion in Court, it must be assumed that he has the authority of the person on whose behalf he professes to be acting, and that he is not called upon to produce his authority. There is nothing to shew that Mr. Duff instituted this proceeding without authority from Fernie, for whom he also appears to have been acting in the Probate Court. Secondly, Whatever might be the effect of the variance between the bond executed and the form given by the Act, (using the word "them" instead of "him"), if it were necessary to assign a breach on that part of the bond, it does not appear to me that it would have the effect of avoiding the bond altogether, where there are other and distinct parts of the condition not affected by this variance; but whether the bond is valid or not must be determined by the Court of Law. In Sandrey *v.* Michell, (3 Swa. & Tris. 25), on an application to put an administration bond in suit, it was held that the Probate Court would not entertain objections to the validity of the

condition of the bond. I think, therefore, that this objectio not to prevail against the application. Thirdly, I do not thin called upon to determine, on this application, whether there h a breach of the bond or not. If a *prima facie* right to sue bond is made out by the creditor, I think he ought to be all bring his action and try the question of the liability of the s In the Archbishop of Canterbury *v.* House (Cowp. 140), Lord field said it was *ex debito justiciæ* to allow a creditor to administration bond in suit; but it was afterwards held tl Court had a discretion in the matter, and might decline to n order though there had been a breach of the bond. Crowley *v.* (1 Curt. 458). Murray *v.* McInerheny, (1 Curt. 576). I these cases the alleged breach was the non-delivery of an in at the time specified in the bond, but the administrator had n cited to bring in an inventory, and therefore the Court ref order the bond to be put in suit.

In the present case, the administrator has been cited to fi an inventory and an account of his administration. He has account in which he omits to charge himself with the procee Policy of Insurance on the life of the intestate for £1,000 s which the creditors alleged he had received, and the Probate after hearing the parties, decreed that the administrator was able with the sum of £1,229 5s. 7d, the proceeds of the pol bonuses thereon, which he had received in addition to the which he had credited in his accounts with the estate. Th that the Fernies are judgment creditors of the intestate—t administrator omitted to file an inventory and account—tha ceived the proceeds of the insurance and did not credit the to the estate—and that the Probate Court decreed that chargeable with it, are not denied either by the administ sureties—indeed the affidavit of Robert Hunter expressly adr receipt of the money by the administrator, and undertakes to for the expenditure of a part of it. Whether the omission the inventory, or to account for the proceeds of the insurar breach of the condition of the bond, can only be determined Court in which the bond is sued. The object of this applic to enable the judgment creditors to try that question, and have omitted to take any proceedings against the administ perfect their right under the judgment, they, and not the s will be the sufferers in the action. In Young *v.* Skelton (5 790), on an application to declare an administration bond fo and to order it to be put in suit, Sir J. Nicholl says: "The "astical Court, when cases of this nature have been properly "ered, has never, I conceive, decided whether there has been a

"of the bond or not. It avoids prejudicing either party." And he directed the bond to be attended with, and produced in a Court of Law for the purpose of being sued. In applications under the English Probate Act, 20 and 21 Vict., c. 77, by which authority is given to assign the bond, it has been held sufficient to entitle the applicant to an assignment if he makes out a *prima facie* case of breach of the bond, that he is entitled to sue for the breach, and that the application is *bona fide*, Sandrey *v.* Michell (3 Swa. and Tris. 25), Baker *v.* Brooks (*Ibid.* 32). *In re* Young (Law Rep. 1 Prob. 186). According to these authorities (and indeed without them) I think the applicants have shewn enough to entitle them to the order. It is unnecessary, therefore, to consider whether the non-payment of the costs awarded by the Probate Court is a breach of the bond; or, assuming it to be so, whether the taking the administrator in execution for those costs amounts to satisfaction. The only remaining objection is, that a copy of the proceedings in the Probate Court was not produced. There is clearly nothing in this. The affidavit states that certain proceedings were taken in the Probate Court, and that an order was made in reference to the administrator's account, and the money in his hands—the substance of which is set forth—giving the dates and amounts and alleging non-payment by the administrator. The correctness of this statement is not denied. It gives all the information that is required, and I know of no reason why the proceedings should be set out *verbatim*.

The order will be, that the administration bond may be put in suit by the petitioners, Henry Fernie and William J. Fernie, according to the provisions of the Revised Statutes, Cap. 136, and that in case the said suit be tried in the city of St. John, that the Registrar of the Probate Court of the said City and County do attend the trial and produce the said bond, in order that the same may be given in evidence; and that if the said suit be tried elsewhere than in the city of St. John, and the plaintiffs deem it necessary, then that the said Registrar of Probates do deliver the said administration bond to Charles Duff, Esquire, the solicitor for the petitioners, for the purpose of being used in evidence on the said trial, on his filing a copy of the said bond with the said Registrar of Probates, and entering into a recognizance before William B. Kinnear, Esquire, Barrister at Law, in the sum of six hundred pounds, to return the said bond in the same state and condition to the office of the said Registrar of Probates after the trial of such cause.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NEW BRUNSWICK,

IN HILARY TERM.

IN THE THIRTY-FIRST YEAR OF THE REIGN OF QUEEN VICTORIA.

The QUEEN *v.* SPARROW and others.

FEBRUARY 7, 1868.

A recognizance entered into for the prosecution of an Election petition before the House of Assembly, under the Rev. Stat., c. 98, and certified to the Supreme Court by the Speaker as forfeited, is not a record; and in *scire facias* on such a recognizance with an averment *prout patet per recordum*, to which the defendant pleaded *nul tiel record*, the production of the recognizance so certified from the files of the Court does not prove the issue.

This was a trial by the Record. The proceedings were by *scire facias* on a recognizance entered into by the defendant under the Revised Statutes, cap. 98, of Controverted Elections, and in the *scire facias* the recognizance and conditions were set out "As by the record "of the said recognizance duly certified and now remaining before "our Justices of the Supreme Court fully appears," and a forfeiture alleged for non-payment of costs taxed by the Speaker of the House of Assembly. The defendants pleaded *nul tiel record;* replication, that there is such a record, &c. In proof of the issue and the only evidence offered by the Crown was the recognizance filed with the Clerk, under § 24 of the Act, upon which it was objected that such recognizance was not a record.

A. L. Palmer, Q. C., contended that the recognizance certified un-

der the Act was itself the record, the terms of the Statute rendering any other record unnecessary, for it provides that the certifying of the recognizance, and its default by the Speaker to the Supreme Court, shall give it the same effect as if estreated in a Court of Law.

S. R. Thomson, Q. C., contra. The only effect of estreating a recognizance is to remove it from the files of the Court where it was entered, and to bring it into the Court of Exchequer. This recognizance cannot be a record, for it is on paper and not on parchment, as required by the Rule of Court. (Allen's Rules 1).

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

This was a proceeding by *scire facias* upon a recognizance entered into by the defendants under the Revised Statutes, Cap, 98, "Of Controverted Elections." The *scire facias* sets out the recognizance and condition, "as by the record of the said recognizance duly certified and now remaining before our Justices of the Supreme Court fully appears," and alleges a forfeiture in the non-payment of the costs taxed by the Speaker of the House of Assembly. The defendants pleaded that there was no record of the said supposed recognizance remaining in the Court in manner and form, &c. Replication, that there is such a record, &c., and this the Queen is ready to verify by the said record, and prays that the said record may be inspected by the Court. The only evidence offered by the Crown to prove the issue, was the recognizance itself, which was filed by the Clerk of this Court under the 24th section of the Statute; and the question is, whether this is a record. The section is as follows: "If the petitioner forfeit his recognizance, the Speaker shall certify such recognizance to the Supreme Court, and the default therein, which shall be conclusive evidence thereof; and the recognizance so certified, shall have the same effect as if the same were escheated [estreated] from a Court of Law; but such recognizance so certified shall be delivered by the Clerk or Clerk Assistant of the House, to a Judge of the Supreme Court, or such officer thereof as the Court shall appoint to receive the same." The chapter of the Revised Statutes under which the recognizance is taken, is substantially a copy of the Act of Parliament, 10 Geo. 3, c. 16, known as the Grenville Act, amended by the 28 Geo. 3, c. 52, and 53 Geo. 3, c. 71. This last Act required a recognizance to be entered into, substantially in the same form as our Statute. See 2 Roe on Elections, 63. The Act by which the trial of Election Petitions is now regulated in England, is the 11 and 12 Vict., c. 98, which requires a recognizance to be given as in the former Act, and directs the Speaker, on default, to certify

the recognizance into the Court of Exchequer and declares that such transmission of the recognizance shall have the same effect as if the same were estreated from a Court of Law. See Clerk on Elections, 505; May's Law of Parliament, 638. The question then is, what is the effect of estreating a recognizance? It does not alter its character. It is the extracting or taking out of the recognizance from the records of the Court, where it was entered into, and sending it to the Court of Exchequer. 4 Bla. Com. 253. When it gets into the Court of Exchequer, if proceedings are taken to enforce it, there must be a record of it at least before the defendant is called on to plead to the *scire facias*. A recognizance is said to be an obligation of record which a man enters into before some court of record, or magistrate duly authorized. "This being either certified to, or taken by "the officer of some Court, it is witnessed only by the record of that "Court, and not by the party's seal." Tomlin's Law Dict. Title "Recognizance." In Glynn v. Thorpe (1 B. & Ald. 153), it was held, upon the authority of Lord Coke, 1 Inst. 160, that a recognizance was not a record until it was enrolled. Lord Ellenborough, C. J., said, "According to this authority (Coke's Inst.) a record must be a memo-"rial enrolled." And Holroyd, J., says, "That to constitute a record "there must be an enrolment." In 2 Saund. 68, referring to this case, it is said, "A recognizance is an acknowledgement or obligation "of record, but it is not perfect until it is enrolled; therefore the "word 'recognizance' does not of itself import a record; and in plead-"ing a recognizance the enrolment must be averred, or the opposite "party is not bound to treat it as a record, but may reply *nil debet*." A record is defined to be "A memorial or remembrance; an authentic "testimony in writing contained in rolls of parchment, and preserved "in a Court of Record." Wharton's Law Lexicon, Title "Record," Co. Litt. 260, *a*. The Rule of this Court also requires that all the records shall be upon parchment. (Allen's Rules, 1.) The common case of proceeding against special bail is a good illustration of the question arising here. In practice the recognizance roll is seldom actually made up unless the bail appear to the suit; but if they do appear and plead *nul tiel record*, and the plaintiff takes issue on it, he can only prove his case by production of the recognizance roll. The Crown having alleged in this case that there is a record of the recognizance, and the defendants having denied the existence of such record, the Crown was bound to produce the record in Court to prove the issue, otherwise the defendant is entitled to judgment. For the reasons stated, we think the production of the recognizance on paper is no proof of a record, and thererfore there must be judgment for the defendants.

Judgment for defendant.

ABELL *v.* LIGHT.

FEBRUARY

Plaintiff was a boarding-house keeper, in whose house defendant had board the use of a room, and some furniture of his own. He went to England, furniture in the house, and after being absent several months, applied tl agent, to the plaintiff for the furniture: she gave up a portion of it, bu rest, claiming a lien on it for a balance due from defendant for board. then brought an action of replevin for the furniture, and obtained a v Judge ruling that a boarding-house keeper had no lien on the goods of Before and and after the trial negotiations for settlement took place b attorneys, plaintiff offering to give up the goods on being paid a certain s defendant refused, offering a smaller sum. The plaintiff's counsel applied trial in the action of replevin, on the ground of misdirection as to the lie Court, after a few days codsideration, refused a rule. While this motion ing, and while the plaintiff's counsel was absent from the town where attending the Court, defendant again applied to her for the furniture, off sum of money if she would give it up in the absence of her attorney, and ing to take proceedings against her and ruin her house if she refused: tl still claimed a right to hold the furniture, and refused to do any thing in t of her attorney. Defendant then applied to the Police Magistrate, and warrant against the plaintiff under the Act 27 Vict., c. 6, for unlawfully, detaining his property and converting it to her own use, under which w was arrested and imprisoned for want of bail, and on examination, the dismissed. In an action for malicious prosecution and false imprisonmer were directed that if the plaintiff was a bailee of the goods, and fraudu verted them to her own use, the defendant had probable cause for the p whatever he might have believed on the subject; that if plaintiff had n lently converted the goods, if defendant believed, and had reasonable believing that she had done so, there was also probable cause; but if l believe plaintiff to be guilty of fraudulent conversion, and in his own min and had reasonable grounds for believing her innocent, then there wa reasonable and probable cause.

Held, That the direction was right; that the knowledge and belief of the as to the plaintiff's claim to hold the goods, and his acts in reference th the inference to be drawn from the acts of the parties, the negotiations ment, the claims by one party and the offers by the other, were proper the consideration of the jury; and that the Judge would not have been directing the jury, that as the plaintiff had no legal right to detain the refusal to give them up, afforded probable cause for instituting the p against her under the Act.

Held also, That under the circumstances, a verdict for £500 damages was sive, it not being shewn that the jury were actuated by any improper acted upon a wrong principle.

This was an action to obtain damages for malicious pro and false imprisonment, on the part of the defendant, in m information on oath before the Police Magistrate of the city John against the plaintiff, under 27th Vict., cap. 6, chargin bailee of certain of his goods and chattels, with having frau converted the same to her own use, on which a warrant was c the plaintiff arrested, imprisoned for some hours in the comm and examined before the Police Magistrate, who dismissed th At the trial before Ritchie, C. J., at the Saint John circuit in last, the following facts appeared in evidence as detailed

plaintiff and her witnesses, the defendant having produced no evidence. The plaintiff kept a boarding house, in which the defendant was a boarder and hired rooms which he occasionally occupied, and which, when he was absent were kept for him. He finally gave up the rooms and left the city, leaving with the plaintiff in the house certain articles of furniture and other personal effects. He subsequently through Mr. Jack demanded his property, which, except a piano, plaintiff refused to deliver up, claiming to have against defendant a demand for a balance due on his boarding account, a charge against him for keeping the rooms for him, and a claim for moving the goods from the house in which they were, when defendant left, to the house to which plaintiff had moved, and where they were when demanded. Failing to get the goods, Mr. Jack, on behalf of and in the name of Mr. Light, caused a writ of replevin to be issued for a portion of the property, he not having an account from Mr. Light of all the property left in plaintiff's possession; and on this writ of replevin the sheriff took the goods named in the writ. Plaintiff says, that when Mr. Jack came about the goods she thought she had a lien on them till her bill was paid, and was so advised by her counsel. Plaintiff put in a general claim of property for some of the goods as having been given her in payment of an old balance, and a special claim for the rest as having a lien on them for the balance claimed by her to be due from the defendant. A writ *de propriatate probanda* was issued, and on the trial before the sheriff the claim and lien were put forward, and the jury wished to return a verdict in the present plaintiff's favor $108 as the amount at which they considered she had established her claim against the defendant, and upon payment of which she was to give up the goods; but as the sheriff could not receive such a verdict, the jury divided three to four and no verdict was given. Immediately after this Mr. Street, the defendant's attorney, and Mr. Kerr, the plaintiff's attorney, met to try to settle. Mr. Kerr says Mr. Street made an offer to pay the $108 without costs, putting Mr. Light's offer to pay this sum on the ground that Mrs. Abell was only a beggar or a thief. No settlement was made, and the suit proceeded, the present plaintiff putting on the record pleas affirming her right to retain the property as having a lien on it for her debt. Mr. Kerr says: "Generally I advised Mrs. "Abell, and generally she has acted under my advice with reference "to this suit; the plea of lien was put in under my advice." The cause was tried and the claim of lien contended for by the plaintiff; but on the Judge directing that a boarding-house keeper, as such, had no lien on the goods of his guests such as inn-keepers have, the verdict was for the defendant; on application to the Judge the postea was stayed, and in Trinity Term a rule *nisi* for a new trial was

moved on the ground of misdirection, which application the Cou took time to consider, and on the following Monday refused. Aft the trial before the Sheriff, and before the trial of the replevin sui the defendant returned to this country. He called on the plainti who says: "I told Mr. Light I held the whole of the things as sec "rity for my demand. I told him several times that I held the goo "as a lien for my debt, and he should settle it with Mr. Kerr During the trial and after, Mr. Light told Powers, a constable, th he might get the matter settled between him and Mrs. Abell, ar that if he would see her and get her to give the things up to hi he (Light) would give him £5 for his trouble, and £15 to her. A the trial the claim and the lien were the points in controversy, Mr Abell's counsel abandoning any claim to the absolute ownership any of the goods. After the trial attempts appear to have bee made to settle or compromise the matter. Soon after this a bailab writ was issued by plaintiff against defendant for the amount sl claimed for board, and on the 12th May, 1865, Mr. Jack, Mr. Light attorney, addressed a letter to Mr. Kerr, asking delivery of the good Mr. Kerr resolved not to answer this letter, and on Mr. Jack's se calling for an answer, said he had no answer to give; but if M Light wished to see him, he might come himself. The same da Mr. Light went to Mr. Kerr's office, and he states that he told Ligl that he had received Jack's letter, but did not intend to advise tl giving up of the goods until the question of law was settled; th the replevin suit which had been tried he must not consider fina that he was dissatisfied with the verdict and intended to move for new trial and would obtain a stay of postea for that purpose, b was extremely anxious to have the matter settled on Mrs. Abel behalf, for his only anxiety was to see her honorably through. Aft some further conversation, it was agreed that Light should send M Duff, his counsel in the suit, in order to settle the matter wi Mr. Kerr. Two or three days after Mr. Duff informed Mr. Kerr th he intended calling to see him about Light's business; to which M Kerr says he replied he was quite ready and would be happy to s him. Two or three days after this Mr. Kerr says he met Light the street, when Light asked him if he had seen Mr. Duff, and Ke said he had not; that Light then said he wanted to get these matte settled, to which Kerr replied, that Mrs. Abell had no money to p him, and he wanted to get the matter settled too. He never had a conversation with him after that. About a fortnight after this, M Kerr says Mr. Duff came to him and said he wanted to see abo Light's business; that he asked Duff what proposition he had make, and that Duff offered to give Mrs. Abell £15, without a costs, to end the whole matter, and that she should give up t

things. Mr. Kerr answered—that would not be right, the Sheriff's jury wishing to find a verdict in her favor for about $108, with costs, it was clear that there was a demand to that amount in her favor; besides that, she claimed a chair and table, and that he had offered to Mr. Street, Light's attorney, to take the $108, with chair and table and taxed costs; that he was expecting to obtain a new trial in the replevin suit; that Light had been holden to bail for £30, though the demand was upwards of £44, and he proposed to take for her £30 and the mere taxed cost, without any counsel fees, which he said he thought was fair; that Mr. Duff said he did not know—Light only proposed £15. Mr. Kerr did not see Mr. Duff again, and no arrangement having been come to he went to Fredericton and moved for a new trial on Friday the 16th June, when the Court took time to consider.

The plaintiff says that after the trial and before the proceedings were taken, Light called several times on her; that the things would have been given up at any time if he had paid his bill; that this was stated by her counsel and herself; and on every occasion, and that previous to her arrest, the agreement for Mr. Duff and Mr. Kerr to settle this matter was mentioned to Light; that Mr. Kerr told her that he and Mr. Duff would settle the matter as Light knew very well Mr. Kerr had gone to Fredericton for a new trial, and she told him she could not have anything to say to him about the business in Mr. Kerr's absence, and that she stated to Light that Mr. Kerr told her not to speak a word to him and not to give up a single item of any of the property till he (Mr. Kerr) returned. At that time her claim against Light was something over £40. Light's last visit to Mrs. Abell was on Wednesday, the 14th June, 1865. She says he told her he knew Kerr had gone to Fredericton to move for a new trial, but he would get none; that he came to her for his things and he would give her £15 and Powers £5, if they would get the things down into one room so that he could come with one or two drays and take them away, while she could cry out and make an alarm that he had broken into her house and taken the things in spite of her; in the mean time she would have £15 in her pocket, and that was more than she would ever get from Kerr, and that he would either go on Friday night's boat to Halifax or on Monday morning to the States on his way to England, and when Kerr came home there would be nothing for him to get; and he pledged his veracity that he would never divulge that she delivered him the things; that she told him she had nothing to do with the things whatever, that Kerr had gone to Fredericton to move for a new trial and told her to have nothing to say to or do with any person till he came home; that she would not interfere with Kerr's business as it was in his

hands: he would be down the next week and they could s
themselves. She then states that Light got in an awful ra
said he would before Sunday send a warrant and destroy h
her house, and put her from getting any boarders or getting a
if she did not comply with his request. She told him, whatev
consequences were, she could not interfere with Kerr's bu
upon which Light went away scolding, and she saw him no m
she saw him at the police office. The same day Light went
Police Magistrate for a warrant against the plaintiff for det
the goods. The magistrate says that on the 15th June a con
was lodged with him by Light; and he produced the original
mation sworn by Light before him, dated 15th June. He sa
evening before B. Boyd Kinnear and Light called on him t
proceedings against Mrs. Abell for unlawfully, as bailee, conv
certain of Light's goods to her own use, under the Act then re
passed. Kinnear stated, that under the facts he thought Ligl
a right to take proceedings under the Act. The magistrate ha
doubt himself about the propriety of taking the proceedings
state of facts as detailed to him, and having understood Du
Light's counsel, and a good lawyer, he wished Light to go a
what Duff said. Duff was out of the way, and he says he
Light told him that he had consulted Jack, who corroborate
near's opinion, but no evidence was offered of this. He says
stated to him all the facts as detailed in his evidence that s
bailee, he owed her nothing; he had demanded the goods a
had refused to give them up. He has no doubt Light spoke
question of lien and the Judge's ruling on it, and of the mat
ing before the Court. He says they came into his private
looked over the Act, the state and circumstances of the cas
discussed, and it resulted in their going to seek further c
Light pointed out the Judge's ruling as one of the strong po
his favor. They left, and came next day. He told Kinnear
there was a number of articles he might make out the infor
specifying them particularly, and the value that was claim
them, and this being done, he took the information, upon w
warrant was issued and the plaintiff arrested. After being
confinement at the police station for several hours she was re
to the common gaol, where she remained until a late hour of t
of her arrest, when bail having been procured for her, she wa
liberty. After an examination before the Magistrate, which
several days, he discharged the plaintiff as to the inquiry.

The plaintiff, as part of the case, put in evidence the proce
before the magistrate, who dismissed the charge and the depo
of all the witnesses on both sides. The most material is

Light himself, who, after specifying the articles which he says were left with plaintiff at her special request, who said they would be there for him if he came back, and if he did not return, she would give them to any person he would send or employ, stated that he authorized Jack to get them. He detailed an interview which he and Jack had with the plaintiff on his return to this country, in which he required his goods, and told her he owed her nothing, and she made no remark about him owing her any thing, and accounted for not delivering them to Jack by saying that he was not authorized to get them, and that she had as good a right to them as he had, affirmiug the letters Light said he had written were forgeries. After arguing the matter with her, Light said, whatever doubt she might have had previously that there was none now. He was there himself and wanted the things and advised her to give them up or otherwise it would be serious. The conversation was broken off by a person coming to the house, whom the plaintiff said was Kerr, and she would not speak any more on the subject then. Light called the next day at her request, reiterated his former demand and arguments, and she said the goods were in the hands of the law and that the law might take its course. In answer to a question whether after the last trial the plaintiff told him she could not act without Kerr, he replied, "I do not think she did. I assumed she was acting "under the advice of Kerr, but she might have given up the goods "if she chose. I understood from general terms that she would not "act without the assent of Kerr. The impression with me is, that if "she had not been acting under the advice of Kerr, the matter would "have been settled long ago. She has never made any personal "claim on me, but I understood she had done it through counsel. "The impression on my mind was that it was through fear of Kerr "that prevented her from giving up the goods." Mr. Jack says, "Either the first or second time I called on Mrs. Abell she told me "that Light owed her; it was on the second time I am certain." There was nothing to shew that the plaintiff in any way converted the goods to her own use. Jack says that all the things remained in the house as when he first saw them, as far as he could judge, and remained so during the several interviews, and the goods were all given up after the Police Court examination to the satisfaction of Light, as proved by Powers. On the trial the counsel for the defendant moved for a non-suit, on the ground that there was no evidence of want of reasonable and probable cause. The non-suit was refused, and the case went to the jury, the learned Chief Justice telling them that the question as to want of reasonable and probable cause was for the Judge; that this question must depend on facts, and until the facts are ascertained the Judge cannot pronounce any

opinion in point of law. Where the facts are ascertained amounts to reasonable and probable cause is a question of la where the facts are in doubt as where they are dependent credibility of witnesses, or where contradictions occur, or wh ferences are to be drawn from facts, then the jury are to p these, and as their finding may be on them, the Judge direct their amounting or not to probable cause; that if Mrs. Abell bailee, and fraudulently took or converted the goods of the be her own use, then there was reasonable and probable cause prosecution, whatever the defendant may have thought or be on the subject; but if Mrs. Abell was innocent, if defendant be and had reasonable grounds for believing she had fraudulently or converted the goods to her own use, there was then reas and probable cause; but if the defendant did not believe her but in his own mind believed and had reasonable grounds lieving her innocent, then there was a want of reasonable and able cause. The jury returned a verdict in favor of the plain £500 damages.

Jack, Q. C., in Hilary Term last, obtained a rule *nisi* for trial on the ground: 1. Misdirection on the part of the learned 2. Excessive damages.

D. S. Kerr, Q. C., shewed cause in Easter Term. An accura vey of the evidence, and of the facts within the defendant knowledge, clearly shews that he had no reasonable or probabl in law. From the relation of bailor and bailee in which the stood no felony could be committed, demand and refusal was dence of it, therefore there was no reasonable or probable cau the acquittal by the magistrate, the subsequent receipt of the by the defendant, and the abandonment of the prosecution evidence of want of probable cause. The only thing in justi is demand and refusal, which does not amount to a conversi is a mere detainer where the goods are held under a claim o for the question of indebtedness has been the issue betwee parties from the first. From the facts, as they appeared at th the learned Judge could not have withheld from the jury t sideration of the defendant's belief or non-belief in the pl innocence of the felony, for the evidence shewed that Ligh that plaintiff's reason for retaining the goods was that he debted to her, and that she had a lien for her demand. As question of excessive damages, the plaintiff has sworn th actual pecuniary loss from the prosecution was £500, indepe of any exemplary damages.

Jack, Q. C., and *Palmer*, Q. C., contra. 1. If defendant had reasonable grounds for believing and did believe the plaintiff was guilty of the defence charged, he had reasonable and probable cause. 2. The want of reasonable and probable cause must be proved affirmatively by plaintiff, and the facts proved do not shew any such affirmative proof. 3. On the contrary, the facts clearly shew that the defendant had a reasonable ground for believing that the plaintiff was guilty of the offence charged, and the only possible ground to make out want of probable cause would be to shew, affirmatively, that plaintiff did not so believe. 4. To prove this could only be done by proving that defendant had committed perjury by making the complaint an oath, and to do that would require the same amount of evidence that would be required on a trial to convict him on an indictment. 5. Before any facts could amount to such evidence they must be such as to disprove any reasonable hypothesis of innocence.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

This was an action for malicious prosecution and false imprisonment. The plaintiff kept a boarding-house, by means of which she supported herself and three children. In May, 1861, the defendant went to board with the plaintiff, and took certain rooms. He was very often absent, and the rooms were by agreement kept for him; he finally went to England, leaving in the house, at the plaintiff's request, various articles of clothing, linen, &c., a piano, pictures, books, engineering instruments, and furniture. After being absent for some time, he wrote to Mr. Henry Jack to call on the plaintiff and get the property so left with her. Mr. Jack received the piano, but the plaintiff, after some discussion, refused to give him the other articles, claiming, finally, to hold them for a balance which she alleged Mr. Light owed her for board, use of rooms, &c. Light then by his agent, Mr. Jack, brought an action of replevin for *some* of the articles, and which were taken by the Sheriff under the writ. That action was defended on the ground that Mrs. Abell had a lien on the goods, and a right to retain them until her claim was satisfied. On the trial the learned Judge ruled against her, directing the jury that though an inn-keeper had a lien on the goods of his guest for his bill, a boarding-house keeper had not. To this ruling Mrs. Abell, by her counsel, took exception, and in Trinity Term, 1865, moved for a rule *nisi* for a new trial. The Court did not immediately dispose of the application, but after a few days taken for consideration, confirmed the ruling of the Judge, and refused a rule. On the 15th June, 1865, after or about the time the motion was made for a new

trial, and before it was disposed of by the Court, the present
ant laid an information against the plaintiff under the Act 2
Cap. 6, before the Police Magistrate of St. John, for unlawf
bailee, detaining and converting certain of his goods to her o
These were the balance of the goods remaining in the plaintif
session, left by Mr. Light as before mentioned. On this infor
the Police Magistrate issued his warrant, under which plaint
arrested, taken before the magistrate, and for want of bail, d
in the police office till the evening of the day of her arrest, a
ing to procure bail, was taken to the gaol and locked up for
hours till, through the exertion of her counsel, bail were o
and she was liberated. An examination was had on this
before the magistrate, which occupied several days, a num
witnesses being examined, as well on behalf of the plaintiff
defendant, and the magistrate, after taking time to consider t
discharged the plaintiff as to the inquiry. It was to recover d
for this prosecution, alleged to have been malicious and v
probable cause, that this action was brought; it was tried bef
Chief Justice at the St. John Circuit in January, 1867, and a
returned in plaintiff's favor for £500. In Hilary Term las
nisi was obtained for a new trial on the grounds of misdirect
excessive damages. Cause was shewn in Easter Term, 1867
then judgment has been unavoidably deferred. The point
direction complained of is as to the manner in which the ju
directed on the question of want of reasonable and probable
The Chief Justice told the jury that the question as to the
reasonable and probable cause was for the Judge; that this q
must depend on facts, and until the facts are ascertained, the
cannot pronounce any opinion in point of law. Where the fa
ascertained, what amounts to reasonable and probable cau
question of law; but where the facts are in doubt, as whe
are dependent on the credibility of witnesses, or contradiction
or inferences are to be drawn from facts, then the jury are
on these, and as their finding may be on them, the Judge di
to their amounting or not to probable cause. That in the
case, if Mrs. Abell was bailee and fraudulently took or co
the goods of the bailor to her own use, then there was rea
and probable cause for the prosecution, whatever the def
may have thought or believed on the subject. But if Mr
was innocent, if defendant believed and had reasonable grou
believing she had fraudulently taken or converted the goods
own use, there was then reasonable and probable cause. Bu
fendant did not believe her guilty, but in his own mind b
and had reasonable grounds for believing her innocent, the

was a want of reasonable and probable cause. In moving the rule the objection to this ruling taken by Mr. Jack was that the Chief Justice should not have left any question to the jury, but should have directed them that the facts were undisputed, that Mrs. Abell had not the slightest right to hold Mr. Light's goods, and having refused to give them up, there was reasonable and probable cause for instituting the proceedings before the magistrate. [After going through the material facts, as detailed by plaintiff's witnesses, no evidence having been produced by the defendant, the Chief Justice proceeded.] It cannot be questioned at this day that it is a question for the jury, whether the facts brought forward in evidence be true or not, but that what is reasonable or probable cause is matter of law, though, as stated in Panton v. Williams, 2 Q. B. 193, some cases appear at first sight to have relaxed the operation of that rule by seeming to leave more than the question of the facts proved to the jury, but which, on further examination, it is said will be found an apparent, not a real departure from the rule, and which is thus exemplified: "In some cases the reasonableness and probability of the ground for prosecution has depended not merely on the proof of certain facts, but upon the question whether other facts which furnished an answer to the prosecution were known to the defendant at the time it was instituted. Again, in other cases the question has turned on the inquiry, whether the facts stated to the defendant at the time and which formed the ground of the prosecution, were believed by him or not. In other cases the inquiry has been, whether from the conduct of the defendant himself the jury will infer that he was conscious he had no reasonable or probable cause. But in these and many other cases which might be suggested, it is obvious that the knowledge, the belief and the conduct of the defendant, are really so many additional facts for the consideration of the jury; so that in effect, nothing is left to them but the truth of the facts proved, and the justice of the inferences to be drawn from such facts, both which investigations come within the legitimate province of the jury, while at the same time they have received the law from the Judge that according as they find the facts proved or not proved, and the inferences warranted or not, there was reasonable and probable ground for the prosecution or not." The rule of law now well established, seems simple enough in the abstract, the principle on which it has been established being sufficiently clear, but its application is by no means always easy. The nnmber of cases in the books, and the expressions constantly found in them, and the practical experience of most Judges, prove that there are few who have not felt the difficulty. In Douglas v. Corbett, 6 E. & B. 514, Coleridge, J., says: "Cases of this nature are of great importance, and the con-

"duct of the trial is always full of practical difficulty. The
"of Exchequer Chamber, in Panton v. Williams, laid down
"which in theory is perfect, but I believe no Judge has sat long
"out feeling himself embarrassed in its application to the specia
"before him." In Busst v. Gibbons, 6 H. & N. 912, Pollock
says: "I do not know where any satisfactory definition of reas
"and probable cause can be found, and it would be very diffi
"give a definition applicable to all the various cases in whi
"question may arise; each case must depend on its own circumst
And in Broad v. Ham, 5 Bing. N. C. 727, Tindal, C. J., thus sta
law: "In order to justify a defendant, there must be a reas
"cause, such as would operate on the mind of a discreet man
"must also be a probable cause, such as would operate on th
"of a reasonable man, at all events, such as would operate
"mind of the party making the charge, otherwise there is no pr
"cause for him. I cannot say the defendant acted on probabl
"if the state of facts was such as to have no effect on his
And again per Coltman, J.: "As the prosecutor would be ju
"by probable cause, notwithstanding the most express malice
"ought always to be an inquiry into the *bona fides* of the p
"tion that will be determined by the Judge himself where th
"and inferences are not doubtful, as in Bluchford v. Dodd, 2 B
"179; but where the facts or inferences are doubtful, it m
"determined by the jury." And in the same case Erskine, J
"It would be a monstrous proposition, that a party who d
"believe the guilt of the accused should be said to have reas
"and probable cause for making the charge. Here the def
"had not expressly made a declaration to that effect; but the
"facts from which it might be inferred that such was his o
"and the effect of these facts ought to be left to the jury. I
vick v. Heslop, 12 Q. B. 274, Lord Denman says, "It would b
"outrageous if, where a party is proved to believe that a ch
"unfounded, it were to be held that he could have reasonab
"probable cause." Again, "I think that belief is essential
"existence of reasonable and probable cause. I do not mean a
"belief, but a belief upon which a party acts. Where there
"such belief to hold that the party had reasonable and probabl
"would be destructive of common sense." In Turner v. Amb
Q. B. 260, Lord Denman says, "The prevailing law of reas
"and probable cause is, that the jury are to ascertain certai
"and the Judge to decide whether these facts amount to such
"but among the facts to be ascertained, is the knowledge
"defendant of the existence of those which tend to shew reas
"and probable cause; because, without knowing them, he co

ı them, and also, the defendant's belief that the facts
d to the offence which he charged, because otherwise he
e made them the pretext for prosecution without even en-
ıg the opinion that he had a right to prosecute." No doubt
ıust give *prima facie* evidence of want of reasonable and
ause. In Cotton *v.* James, 1 B. & Ad. 133, Lord Tenterden
may be conceded that in general the plaintiff must give
idence shewing the absence of probable cause, but such
is in effect the evidence of a negative, and very slight
of a negative is sufficient to call upon the other party to
ıe affirmative." And in Taylor *v.* Williams in error, 2 B.
7, the same learned Judge says, "The want of probable
in some degree a negative, and the plaintiff can only be
pon to give some—as Mr. J. Le Blanc, a most accurate
ays—slight evidence of such want." In moving the rule,
put forward the broad proposition that the Judge should
cted that there was reasonable and probable cause, based on
ıption that the facts necessary to constitute such cause were
licted; that they amounted to this—that plaintiff was a
ıat she had no legal right to retain the goods; that she did
m after demand; therefore there was reasonable and prob-
for proceeding against her under the statute. Possibly this
so if the case presented itself in this bold manner, because
ıgful detention, unexplained, might possibly be *prima facie*
of a fraudulent detention. But this assumption ignores all
unding circumstances of the case. The offence with which
iff was charged, was neither the detention nor the wrongful
of defendant's goods, but their fraudulent detention. Mr.
ı supporting the rule, rather shifted, or endeavored to avoid
ılty, though, to make his contention available, he must in
tain Mr. Jack's proposition in its integrity; for the objection
l question raised on this rule is not that the Judge drew a
nclusion from the facts found, nor is it that the verdict is
vidence, but it is that the Judge should have submitted
o the jury, and should have directed them that on the facts,
l. there was reasonable and probable cause. Mr. Palmer
is contention to several propositions, which we noted in his
ls as follows:—1. If defendant had reasonable grounds for
and did believe that plaintiff was guilty of the offence
he had reasonable and probable cause. 2. The want of
and probable cause must be proved affirmatively by plain-
the facts proved do not show any such affirmative proof.
contrary, the facts clearly show that the defendant had a
ground for believing that plaintiff was guilty of the offence

charged, and the only possible ground to make out the want of p able cause in this case would be to show affirmatively that the fendant did not so believe. 4. To prove this could only be don proving that the defendant had committed perjury in making complaint on oath, and to do that, it would require the same amour evidence that would be required on a trial to convict him on an inc ment. 5. Before any facts could amount to such evidence, they n be such as to disprove any reasonable hypothesis of innocence. Palmer's first proposition is entirely in accord with the Chief Jus who ruled precisely as Mr. Palmer says he should. As to the sec and third propositions, the learned Judge did not pretend to say the trial that the affirmative proof of want of reasonable and p able cause was not on the plaintiff; but Mr. Palmer says the f do not prove this affirmatively, but on the contrary clearly s that defendant had a reasonable ground for believing plaintiff gu of the offence charged, and he says, the only possible ground to m out the want of probable cause in the case, would be to shew a matively that the defendant did not so believe. How is this b to be proved? We have no process by which we can enter the br of a man and search the thoughts of his heart. Must it not be f the nature of the case itself, its surrounding circumstances, the tions of the party himself with reference to it, and from facts circumstances brought to his knowledge negativing what it is sumed he believed, and all tending to the conclusion that no rea able man could have so believed? Can any one who heard this c or who has read the evidence, assert with any show of reason there was no conflict of testimony as to Mr. Light's belief of fraudulent character of the act which was the essence of the off charged? If, indeed, all was not on plaintiff's side uncontradic rebutting the fraud, and leading to the conclusion that how aggrieved Mr. Light may have felt at not getting his goods, he n have believed that plaintiff was acting on the *bona fide* belief conviction that she had a legal right to detain them, and there was not holding them fraudulently, and so could not be charged a felony; that the claim she set up was a *bona fide* claim of ri or if Mr. Light really abstractedly believed her guilty, can any say that there was not evidence for the jury that there was no sonable ground for such a belief? The ascertainment of plaint belief must be a question of fact deduced from all the circumsta of the case. Now, what are the facts which the evidence in case unanswered established? The character of the plaintiff boarding-house keeper; the indebtedness of defendant to her on count of board, rent of rooms, &c.; the claim of plaintiff to hold goods by virture of a lien; the effort of defendant to obtain pos

sion of a portion at least by legal process; plaintiff taking legal advice and being sustained by such advice in the belief of her legal right; plaintiff's putting forward such a right in a legal and proper manner, in answer to defendant's effort to obtain possession with a view of having that right legally determined; the negotiations from time to time for an amicable settlement; the fair presumption that these negotiations were conducted on both sides based on a controversy respecting the civil rights, and not involving the compromise of a criminal offence; the absence of any criminal imputation throughout all these proceedings till the threat of the evening when application was first made to the magistrate; the efforts of the defendant to obtain the goods in the absence of plaintiff's legal adviser, and when she was *inops consilii*, and in derogation of the just rights of the plaintiff's legal adviser, and in fraud of them. Failing to induce the plaintiff by persuasion to accept his offer; the defendant's threat to ruin her and her house if she refused to accept it and comply with his proposal; the absence of any direct evidence to establish that plaintiff in withholding the goods was actuated by any fraudulent intent; the strong uncontradicted evidence that plaintiff believed she had a *bona fide* legal lien on the goods, and that she was standing on what she believed her legal rights; the clear evidence that the defendant knew the grounds on which she was resisting his claim; the absence of all evidence on the defendant's part that he really believed she fraudulently withheld the goods; the taking criminal proceedings when defendant knew that the very question in issue was being adjudicated upon by a competent tribunal; the reluctance of the Police Magistrate to issue the warrant in the first instance, and his doubts, communicated to the defendant, of the propriety of its being issued at all; and the fair inference that he finally acted on the assertion of Mr. Light that he had consulted other experienced counsel (of which no proof was offered), and that Mr. Kinnear's opinion was corroborated—leaving the responsibility of the step on Mr. Light and his advisers—and add to all these Mr. Light's own declarations on the examination in the police office. It will hardly be gainsayed, to say the least of it, that there was ample evidence for the jury, whose attention was most particularly called to all the facts and circumstances calculated to throw any doubt on the *bona fides* of plaintiff in setting up the claim of lien. Of the two last propositions of Mr. Palmer, after what has been said and the cases referred to, it is only necessary to say, that they are propositions opposed to every principle of law applicable to this case, and every decided case bearing on the question. Did the plaintiff not then do all that was necessary to make out her *prima facie* case, by giving affirmative evidence of want of reasonable

and probable cause? Though she had no right of lien, a legal right to detain, still, if the act of detention was under taken notion, but on a *bona fide* claim of right, under the that she had a lien, and this was known to the defendant, had reasonable grounds for believing, or did believe she so what pretence was there for a charge of felony? How c *bona fide* claim of right be converted into a felony? In ans this case the defendant offered no evidence whatever, either belief that the plaintiff fraudulently detained the goods, or grounds for such a belief, or that he was misled or acted in ign Had the verdict been the other way a question might hav raised whether the Judge, in view of the plaintiff's evidence, the absence of any thing on behalf of the defendant, to reb presumptions raised thereby, should not have gone further t did, and, acting on the uncontradicted facts of the case, inst leaving the question to the jury, have directed them that th dence as it stood exhibited a want of reasonable and probable But while we are not called upon to say that the Chief Just not rule as favorably for the plaintiff, as under all the circums he might possibly have done, we have come to the conclusion th was a case for the jury at all, it was put strictly in accordanc the law, as well settled—see Heslopp v. Chapman, (22 Law 296), Douglas v. Corbett (6 E. & B. 510)—and as favorably defendant as it could possibly have been consistently with d cases. By the finding of the jury it was established to thei faction that the plaintiff was innocent of the charge; that t fendant, when he instituted the proceedings did not belie plaintiff guilty of the felony, but in his own mind believed reasonable grounds for believing she was innocent; and it is our power to relieve him from the consequences. As to the q of excessive damages, the Chief Justice told the jury that th tion of damages was peculiarly within their province; that, regard to a fair consideration of all the circumstances of th they should give such an amount as they thought plaint fairly entitled to, for the wrong she had suffered in her arre imprisonment, the necessary expense she was put to, and t she had sustained as the direct consequence of the prosecutio that if the jury should come to the conclusion that the def had no ground for instituting the proceedings, but kno violated the law, using it wrongfully to accomplish his own pu to the injury of the plaintiff's feelings, person and propert were warranted in being liberal in damages. The jury had ev of the plaintiff having been put to large expense and liabili defending herself against the charge. There was the arrest a

tention of the plaintiff all one day at the Police office; her subsequent imprisonment in gaol for several hours; the difficulty she experienced in getting bail on account of the large amount required; the great distress and anguish of mind she actually suffered; the actual injury to her credit, and, if her statement is true, and it was not controverted, the verification of the defendant's threat, in the almost total destruction of her business, and in the ruin of her house; and lastly, the jury had the sworn estimate of the plaintiff that her actual pecuniary loss was £500. For this amount the jury found, and can we say they proceeded, in estimating these damages, on any wrong principle; or that they were influenced by any improper motive; or that there was not evidence to justify them? It may, or may not be, that we, individually, would not have assessed the damages so high, but the jury, not we, are the judges; and unless we are clearly satisfied they have acted improperly, we have no right to over-rule their decision, and usurp their clear functions. The cases on this point are numerous, and all strictly consistent so far, such as the case of Leeman v. Allen, 2 Wils. 160. Three hundred pounds was held not necessarily excessive for a few hours imprisonment. In Farmer v. Darling, 4 Bur. 1971, £250 was held not excessive for a malicious prosecution for nuisance; and in Hewlett v. Crutchley, 5 Taunt. 277, which was an action for malicious prosecution, indictments were preferred and found, and the party voluntarily surrendered to take his trial. On opening the case the counsel for the prosecution stated, as they were instructed to do, that the defendant had not accounted for the fees he had received, but that his conduct had been in all other respects deserving of commendation, and that they were of opinion that the prosecutor had been mistaken in considering the facts as constituting a case of felony, and declined giving any evidence. Plaintiff had never been arrested, he had expended about £100 in his defence. The jury found £2,000 damages. A new trial was moved for, upon the ground of excessive damages, but, per Lord Mansfield, "It is extremely difficult to estimate damages. "You may take twenty juries, and every one of them will differ from "£2,000 down to £200. I have always felt it that it is extremely "difficult to interfere and say when damages are too large; never-"theless, it is now well acknowledged in all the Courts of Westmin-"ster Hall, that whether in actions of criminal conversation, malicious "prosecution, words, or any other matter, if the damages are clearly "too large, the Court will send the inquiry to another jury. There "are some damages so large that it is impossible but that every man "must acknowledge they are too large; but in every case where the "Courts interfere they always go into all the circumstances of the "plaintiff and defendant, and put themselves in their situation and

"enter into all their conduct." The learned Judge then considerec the facts and concluded the damages were not excessive. In th more modern case of Creed v. Fisher (9 Exch. 475, s. c. 26 Law an Eq. R. 386), Pollock, C. B., says: "We should not, in our own pri "vate judgment, have given such damages as here given by the jury "but that fact alone is not sufficient to show us that the jury, i "giving these damages, must have been actuated by some impropr "motive, or proceeded on some erroneous principle of assessmen "To assess damages is the function of the jury, and the Court ough "not to disturb a verdict on the ground of their being excessive, un "less under one of the two states of circumstances I have mentioned. In Smith v. Woodfine, 1 C. B. N. S., 666, Creswell, J., says: "But i "is said that the jury have awarded the plaintiff an unreasonabl "and excessive amount of damages. No legitimate ground bein "laid for it, it seems to me we should be guilty of a most inconve "nient and unconstitutional exercise of our power, if we took upo "ourselves to interfere with the discretion, which the law has in "peculiar manner vested in the jury in cases of this sort." An Willes, J., in the same case, after saying the damages were larg says: "But I have no means of estimating the propriety of th "assessment, seeing that I am unable to satisfy my mind that the "have either been misled or have acted from bad or corrupt motives. And in the very recent and last case we are aware of bearing o damages in cases of this kind, Berry v. De Costa (Law R. 1. C. I 334), Willes, J., says: "We are not called upon to say whether o "not we, if sitting in the place of the jury, would have awarded s "much, or whether the substantial justice of the case would not i "our opinion have been satisfied by a somewhat less amount." An Smith, J., says: "In commercial cases there is something like "standard by which the Court may judge of the propriety of th "account given, but in cases of this sort it is peculiarly the provinc "of the jury to say from all the surrounding circumstances what con "pensation the injured party is entitled to receive, and it is quite im "possible to analyze the elements of their verdict." We cannot, there fore, disturb the verdict in this case, and the rule must be discharge

Rule discharged.

GILBERT v. CAMPBELL.

FEBRUARY 20, 1868.

Where a party is served with a subpœna to attend as a witness and accepts a sum money which is tendered to him for his expenses, without objecting to the amou but refuses to attend on account of his own business, he is liable to an attachm for non-attendance, even though the sum tendered be less than he is entitled to ceive under the ordinance of fees.

C. W. Weldon, on a former day in this Term, obtained on affidavits a rule *nisi* to shew cause why an attachment should not issue against Bartlett Lingley for not obeying a subpœna to attend as a witness in the above cause at the last Westmorland Circuit. It appeared that Lingley had been informed previously, by the defendant's attorney, that he would be required as a witness, and promised to attend. On the subpœna being served upon him at St. John, he said he could not go, and would not, but he accepted $12 which was then tendered him for his expenses.

Duff, Q. C., in shewing cause read the affidavits of Lingley and A. L. Palmer, shewing that the distance from St. John to Dorchester was one hundred and twenty miles, and that $12 was the amount usually allowed for mileage for that distance, contending that the amount tendered not being sufficient to cover his other expenses, he was not bound to obey the subpœena.

S. R. Thomson, Q. C., and *C. W. Weldon*, contra. If Lingley had taken the objection to the amount when it was tendered, he might have sustained his position, but having accepted it, he cannot now take any advantage of this objection.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

This was an application for an attachment against B. Lingley for not obeying a subpœna to attend as a witness for the defendant, in this cause, at the last Westmorland Circuit. It appeared by the affidavit of the defendant's attorney, that he had called upon Mr. Lingley in St. John several days before the opening of the Court, and told him that he should require him as a witness at Dorchester; that Lingley at first stated that he was very much engaged and could, not attend, but afterwards promised that he would do so on being telegraphed to, requesting the attorney not to send for him unless it was absolutely necessary. After this Lingley telegraphed to the defendant's attorney at Dorchester that he was going to Nova Scotia on the 22nd July, and the attorney being very anxious to have him in attendance, caused him to be served with a subpœna on the 20th July to attend at Dorchester on the 23rd, and $12 was given to him for his expenses. He said to Mr. Travis, who served the subpœna, that he could not go, and would not; that it was impossible for him to do so as his family was sick; and on the morning of the 23rd July Mr. Travis telegraphed to the defendants at Dorchester, that Lingley could not possibly attend, and was prevented by important business. The only answer given by Lingley to the application is

his own affidavit, stating that the distance from St. John to Dorchester is one hundred and twenty miles, and an affidavit to the same effect by Mr. Palmer, also stating that in his practice he had always been allowed $12 as the travelling fees of a witness from St. John to Dorchester, besides the fees for attendance. Admitting the distance to be correctly stated in these affidavits, it is evident that the amount paid to Lingley at the time he was served with the subpœna was not as much as he was entitled to receive under the ordinance of fees, and had he objected on that ground and refused to receive the money, it would have been an answer to the application; but he accepted and kept the money, alleging the illness of his family as a reason for not attending. This, however, does not seem to have been of so serious a nature as to prevent him from going to Nova Scotia and his reason finally assigned for refusing to attend (according to the telegram from Mr. Travis) is the importance of his own business. He has not denied that this telegram was sent by his authority, nor has he offered any excuse for his non-attendance, except that the amount paid him was insufficient. A witness may waive his right to his expenses; and we think Lingley did so in this instance by retaining the money without objection as to the amount, and putting his refusal to attend upon a different ground. Dixon v. Lee, (1 C. M. & R. 647), Newton v. Haviland, (9 Dowl. 6), Gough v. Miller (8 Jurist 658), s. c. *nom*, Gott v. Mills, (2 D. & L. 23). The duty of attending a Court of Justice to give evidence, is paramount to the private interests of the witness and indispensible to the proper administration of justice; and it is the imperative duty of the Court when cases of this kind are brought before it, to see that its process is not treated with contempt. In this case, we think the party has been guilty of a wilful default, and therefore the rule for an attachment must be made absolute.

JONES v. STEEVES.

A defendant, rendered by his bail after judgment, wrote to his attorney, requesting him to see the plaintiff's attorney and endeavor to compromise the debt and get time for payment. Within three months after the render of the defendant this letter was communicated to the plaintiff's attorney, who, after seeing the plaintiff, informed the defendant's attorney of the terms on which the plaintiff was willing to settle.

Held, That it was the duty of the defendant's attorney to communicate the offer to his client, and that until he did so, the treaty for settlement was pending, and the defendant was not entitled to a supersedeas for not being charged in execution within three months after the render.

H. B. Rainsford moved to rescind an order, made by ALLEN, J

refusing to discharge the defendant out of custody on supersedeas—under the 10th Rule of Hilary Term, 1839, (Allen's Rules, 37)—defendant not having been charged in execution within three months after render. Judgment was signed on the 5th June, 1867, and on the 5th July, the defendant was rendered in discharge of his bail to the custody of the sheriff of Westmorland, and notice of render served on the plaintiff's attorney on the 8th. A summons, requiring the plaintiff to show cause why the defendant should not be discharged by supersedeas, was taken out on the 29th November and served on the 5th December last. It appeared by the affidavits used on the hearing of the summons, that the defendant had written to his attorney (Mr. Dibblee) on the 19th September, stating his inability to pay the plaintiff's judgment, and requesting Mr. Dibblee to see the plaintiff's attorney and ascertain if he could not compromise and get time to pay the debt, and to inform the defendant of the result. This letter was communicated to the plaintiff's attorney about the end of September. Some weeks after this and apparently after the expiration of the three months—the affidavits on this point not being very explicit—he saw the plaintiff and ascertained the terms on which he would settle, which terms he stated he had written to the defendant, but received no answer. He also informed Mr. Dibblee that the plaintiff was willing to discharge the defendant on obtaining a conveyance of his interest in a certain piece of land; that he heard nothing more of the matter till he was served with the summons for supersedeas, when he spoke to Mr. Dibblee, who stated that he had intended to communicate the proposition for a settlement to the defendant, but had forgotten to do so. ALLEN, J., refused to order a supersedeas. being of opinion that it was the duty of the defendant's attorney to communicate to him the plaintiff's offer; and that until he did so, and the plaintiff's attorney was informed of the result, the treaty for a settlement was pending, and the plaintiff not in default in not issuing an execution.

H. B. Rainsford contended, 1st, That there was no sufficient treaty in writing—it should state that proceedings were stayed at the defendant's request. Chit. Arch., 913. (ALLEN J.: I thought that the defendant's letter was a sufficient treaty under our Rule of Court, which differs from the English rule.) 2nd, The treaty was at an end when it was not accepted within a reasonable time.

Per Curiam. There is no ground for disturbing the Judge's order. It is for the prisoner's protection that the treaty must be in writing; and there was a treaty in writing here. When the plaintiff's attorney stated to Mr. Dibblee upon what terms he was willing to settle,

it was Mr. Dibblee's duty to communicate the offer to the defend and to inform the plaintiff's attorney whether it was accepted not. Until he received an answer, the plaintiff's attorney ha right to consider the matter as pending.

Order refuse

McELROY *v.* GETTY and an other, impleaded with ELLIS.

In an action by the assignee of a limit bond, to which *non est factum* is pleaded, common *venire* to try the issue, is sufficient; and the plaintiff need not have ages assessed, but may take a verdict for nominal damages, and issue executio the amount of his debt.

Debt on a limit bond, brought by the plaintiff as assignee of Sheriff of the County of Charlotte. The declaration alleged arrest of Ellis, at the suit of the plaintiff on mesne process for $1 that the other two defendants became his bail for the limits; t Ellis escaped from the limits, whereby the bond became forfei and that the Sheriff thereupon assigned the bond to the plaintiff, means whereof, and by force of the statute, an action had accr to the plaintiff to demand and have the sum of money in the b mentioned, yet the defendants, or either of them, had not paid, Plea by the defendant Getty—*non est factum;* and by the other fendant, that the Sheriff did not assign the bond.

At the trial before ALLEN, J., at the last Charlotte Circuit, *venire* was in the common form to try the issues. A verdict taken by the plaintiff by consent for nominal damages, with le to the defendants to move to enter a nonsuit if the Court shoul of opinion that the assignment of breaches in the declaration not sufficient, and that a special *venire* was necessary.

A rule *nisi* having been obtained for that purpose in Michael term last—citing McKenzie *v.* Marsh (2 Kerr, 629); Act 12, Vic 39, § 24, (2 Rev. Stat., 357.)

Abbot now shewed cause. The 24th Sect. of the Act 12 Vic 39, only applies to judgments by default or on demurrer. Nei does the statute 8 & 9 Wm. 3, c. 1, apply to a bond like this. bonds and replevin bonds have been held not to be within that s ute (2 Saund., 187), and for the same reason it will not apply t limit bond. In Forster *v.* Pine (2 Allen, 215), which was an ac on a limit bond, it does not appear that there was any special ve under the plea of *non est factum*, the common *venire* is suffici

and the jury might, if necessary, have assessed the damages. Parkins *v.* Hawkshaw, (2 Stark, 381), Quin *v.* King, (1 M. & W., 42), Scott *v.* Staley (6 Dowl., 714). The plaintiff was not bound to assess the damages: if he issues execution for more than is due, he does so at his peril. Scribner *v.* Gibbon (4 Allen, 182).

H. B. Rainsford contra. The plaintiff should have assigned breaches in the declaration. [*Ritchie, C. J.:* The declaration does assign breaches]. The *venire* should have been special, to assess the damages, as well as to try the issues. The defendants had a right to shew, in mitigation of damages, that Ellis was insolvent. Mc Kenzie *v.* Marsh decides that the statute applies to limit bonds.

Per Curiam. If there had been a special *venire*, and both parties had been willing to go into the matter, we do not say that a jury would not be a very proper tribunal to assess the damages, as was done in McKenzie *v.* Marsh; but it was not necessary to do it. The plaintiff issues execution at his peril; and if he issues it for too much, the defendant must apply to the court for relief under its equitable jurisdiction.

Rule discharged.

LESLIE *v.* HANSON.

Plaintiff agreed, in writing, to deliver the defendant 100,000 feet of logs in his boom, on condition that the defendant would deliver the plaintiff a like quantity out of the defendant's logs at another place, and if there was any overplus of plaintiff's logs, that defendant should pay him for them at a certain rate. The plaintiff received 100,000 from the defendant and delivered him about 155,000. Held, That the price of the overplus could be recovered on the count for goods sold and delivered.

Logs were measured as they were sawed in a mill, and their contents marked on a board by the persons who sawed them. At the end of each week the figures on the board were transcribed into a book by a person who had made a part of the measurements, but who could not tell, from the character of the figures on the board, what portion of them was made by either of the other parties. Held, That the book was not evidence to prove the quantity of logs sawn, without calling all the persons who had measured the logs.

In an action to recover the price of logs, the plaintiff, in order to prove the quantity received by the defendant, shewed the average size and number of logs put in and driven down a stream, at the mouth of which defendant had a saw mill, and that the defendant had sawn a portion of them. Held, In the absence of any evidence by the defendant, of the quantity he had sawn, that the jury were justified in presuming he had received the whole quantity driven down the stream by the plaintiff.

Indebitatus assumpsit to recover the price of a quantity of spruce logs:—tried before ALLEN, J., at the York Sittings in January last. It appeared by the cross-examination of the plaintiff, that there was a written agreement about the logs. The defendant's counsel pro-

duced the agreement, which was put in evidence by consent. By this agreement, the plaintiff undertook to haul 100,000 feet of logs for the defendant, and drive them into defendant's mill-boom, on condition that he should give the plaintiff a like quantity out of his logs in the Nashwaak boom—the plaintiff to pay the expense of driving the logs, and half the amount of the mileage and stumpage; and that the defendant was to pay the plaintiff for any overplus of logs he might have beyond the 100,000, at the same price one Hatheway had agreed to pay him.

The plaintiff claimed to have delivered 155,000 feet of logs, and admitted to have received 100,000 feet at the Nashwaak boom, according to agreement, the difference, 55,000, was the matter in dispute. The plaintiff gave evidence of the number of logs put into the stream, and driven into, or near, the defendant's boom; of their average by measurement, and that the defendant had sawn a portion of them in his mill, situated at the mouth of the stream in which the logs were. The defendant denied that he had received the quantity of logs alleged by the plaintiff, and offered evidence to shew the quantity sawn in his mill. It appeared that the logs were measured in the mill before they were sawed, and the contents of each log marked on a board by the persons who measured them; the figures on the board were transferred to a book at the end of each week and the board was then destroyed. Three persons had been employed in measuring the logs, but one of them (Abernethy) was not called as a witness, and the others were not able to state the quantity of logs which they had respectively measured. The entry in the book was offered in evidence, but rejected, as the witness was unable to state what part of the figures which he had transcribed from the board, had been made by himself, and what part by the other persons engaged in measuring.

The defendant moved for a nonsuit on the ground that the plaintiff should have declared on the written agreement, and averred performance of the conditions on his part; but the learned Judge was of opinion, that as the plaintiff only claimed to recover for the overplus of the logs after the delivery of the 100,000, and they had been received by the defendant, and no further act remained to be done by the plaintiff, he could recover on the common count. The learned Judge directed the jury, that as it was admitted the defendant had sawed some of the logs, and he was the only person who could shew what quantity he did saw, it was his duty to do so; and in the absence of evidence on this point, they might presume that he had sawn the whole quantity put into the stream by the plaintiff, though they were not bound to act on that presumption. The jury gave a verdict for the plaintiff for the amount claimed.

B. C. Friel now moved for a new trial on the ground of misdirection and the improper rejection of evidence. He contended, 1st. That the action should have been special on the contract. 1 Chit. Pl., 339; Chit. Cont,, 465. Reed v. Hutchison (3 Camp., 352; Harrison v. Luke (14 M. & W., 139). [RITCHIE, C. J.: The case of Sheldon v. Cox (3 B. & C., 420), is directly against you. Nothing remained to be done here, but the payment of the money for the logs delivered.] 2nd, There was misdirection as to the quantity of the logs cut by the defendant. [RITCHIE, C. J.: I think the direction was right.] 3rd. The evidence of the book, shewing the quantity of logs cut in the mill, was improperly rejected. [ALLEN, J.: There was nothing to show that some of the figures on the board were not made by Abernethy, who measured and sawed some of the logs; in fact, the evidence tended to shew that he did so. If he made no figures on the board, there was no evidence then to shew what quantity of the logs he sawed. I thought, therefore, the entry in the books could not be received. RITCHIE, C. J.: I do not see any objection to that.]

Per Curiam. Rule refused.

DOE ex dem LEVI v. SAMUEL.

Where a will was contested by the heir-at-law, on the ground of undue influence by the devisee with the testator, but no evidence thereof was given, the Judge should not leave such a question to the jury.

Letters written by a testator to his relatives before making his will, stating his intention to leave his property to them, are not admissible in evidence to defeat a will disposing of his paoperty to another person; though the will is attacked on the ground of the testator's incapacity, as being *in extremis* at the time of its execution.

Ejectment for land in Richibucto, tried before ALLEN, J., at the last Kent Circuit.

The lessor of the plaintiff resided in London, and claimed as the brother and heir-at-law of Morden S. Levi, who died at Richibucto on the 28th July, 1863, leaving a will, by which he devised all his property to the defendant; and the question was, whether this will was duly executed—the plaintiff's case being that improper influence had been used by the defendant to induce Morden S. Levi to make the will when his mind was in such a weak state as to be unable fully to understand what he was doing. M. S. Levi had been confined to his house by illness twelve days, and a few days before his death, the physician attending him advised him to settle his affairs. In consequence of this, he had a conversation with his attorney the

night previous to his death about making his will, but gave n structions, it being understood that the attorney should see about it the next day. On the following morning, about ten o'c he told his house-keeper, whom he had informed of his intenti make a will, to send for his attorney and the defendant. They to the house together, and the attorney went into Levi's bed and received his instructions about the will, which was very s and which he wrote in an adjoining room. and read over to who said that it was all right, and as he wished it. One of the nessess to the will was present during this time. Another wi was then sent for, and the attorney read the will again to Levi asked him if it was as he wished it, to which he answered " and it was then executed. Levi was too weak to sign his nan the will, and at his request, one of the witnesses put his mark He then asked for his housekeeper, and when she came intc room, he spoke to her. and said it was all over. Immediately this he became suddenly worse, and died in a few minutes—a half an hour after the will was signed. The attorney who drev will, both the witnesses, the nurse, and two other persons in his ploy, all testified that his mind was perfectly sound. and that he fully capable of understanding what he was about, until with few minutes before his death. The physician, who had visited less than two hours before his death, stated that his mind was fectly clear at that time; that the disease of which he died wa likely to disturb his mental faculties; and that he would be li to retain his memory to the last. The defendant was a cous Levi, and they had been in partnership and lived together for se years before his death. The defendant was not present when instructions were given for the will, or when it was executed, he denied having influenced the testator, or given any instruct or having any conversation with the attorney about the will be it was executed. Declarations of Levi were proved, made tw three years before his death, that he intended to leave all his p erty to the defendant. In reply to the defendant's case, the plai offered in evidence, letters written by the deceased to the lesso the plaintiff, (it was not stated at what time), showing the term friendship existing between them, and to show how he intende leave his property. The learned Judge rejected these letters, stat that though a party might, at one time, intend to give his prop to one person, he had a right to change his mind and give i another; therefore letters written previously could not control will. In leaving the case to the jury, the learned Judge stated the only question was, whether Levi was of sound mind at the t the will was signed; whether, at that time, he was in a state of n

fully to understand the effect of what he was doing, and to know how he was disposing of his property; or whether he was in such a state, that he merely assented to the will as it was read to him, without understanding its purport and effect. That the mere fact of the will being executed only half an hour before the testator's death, did not necessarily show his incompetency, though it certainly caused some suspicion, and required clear evidence of the state of his mind. He referred them to the evidence of the physician as to the effect likely to be produced upon his mind by the disease, and stated that unless they were satisfied that the testator fully understood the nature of the disposition he was making of his property by the will, the plaintiff was entitled to recover. Verdict for the defendant.

Fraser now moved for a new trial: 1st, on the ground for misdirection, in not leaving to the jury the question whether undue influence had not been used by the defendant and others to induce Levi to make the will. 2nd. The improper rejection of the letters written by him to the lessor of the plaintiff. He cited Taylor's Med. Jur., 1093, Hastilow *v.* Stobie (Law R. 1 Prob. & Div., 64); Goodacre *v.* Smith (Ibid, 359).

Per Curiam.—There was no misdirection; there was not the least evidence of undue influence to leave to the jury. We also think the letters were properly rejected. The admission of such letters would go to cut down the statute of Wills. If this will was not properly executed it would be difficult to find any case of a good execution. Unusual care seems to have been exercised here.

Rule refused.

GENERAL RULE.

1. ORDERED, That all papers which may have been taken off the files of this Court, either on the Equity or Common Law side, under the order of the Court or any Judge thereof, by any Attorney or other person, be forthwith returned to the Clerk of this Court and restored to their respective files.

2. No record, paper or document on file in the Office of the Clerk of this Court shall hereafter be removed therefrom, except under the especial order of the Court or one of the Judges thereof, to be obtained only on it being made clearly to appear by affidavit to the Court or Judge, that the original record, paper or document is indispensably necessary to be used in some Court of this Province, or before a Judge thereof, and that a copy of such record, paper or document cannot be used in lieu thereof.

3. The Clerk of the Pleas or the Clerk in Equity, as the case may be, shall enter in a Book the title of the cause, the description of the record or papers, the date of removal, and the name of the Attorney on whose application any such order shall have been granted; and shall enclose the record or papers permitted to be removed, in a

sealed envelope, indorsing thereon a description of the record or papers enclosed, and direct the same to the Clerk of the Circuits or the Clerk of the Court in which the same are to be used to be delivered to the presiding Judge at the Circuit or Court where it is intended to use them, and shall himself place the same in the possession of the said Clerk, or remit the same to him by Mail if necessary; and if such records or papers are required to be used on the trial, the presiding Judge shall break the seal of the envelope, and deliver the said records or papers to the custody of the Clerk of the Court during the progress of the trial, and such Clerk shall. at the conclusion of the trial, again enclose and seal up the said records or papers, and after being identified by the signature or initials of the presiding Judge, shall forthwith return the same to the proper custodian.

W. J. RITCHIE,
L. A. WILMOT,
JOHN C. ALLEN,
J. W. WELDON.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NEW BRUNSWICK,

IN EASTER TERM.

IN THE THIRTY-FIRST YEAR OF THE REIGN OF QUEEN VICTORIA.

CAMPBELL *v.* WHEELER.

In trespass for impounding cattle, the defendant pleaded "not guilty," and at the trial his counsel opened a defence, justifying impounding the cattle *damage feasant*, and examined several witnesses to prove it: the plaintiff's counsel then objected that the evidence was not admissible under the plea; but further evidence was received, and the defendant obtained a verdict. The Court refused a new trial on the ground of the improper admission of the evidence, the damages, if any, being very small.

Quære, whether the plaintiff had not waived the objection, by not taking it before the defendant gave any evidence of justification.

Trespass for taking away and impounding a cow. Plea—not guilty. At the trial before ALLEN, J., at the York Sittings in January last, the defendant's counsel, in opening the defence, stated that he should prove that the cow was taken *damage feasant*, having broken into the defendant's field under lawful fence. Several witnesses were examined to prove this defence, and cross-examined by the plaintiff's counsel; after which, he objected that the evidence could not be given under the general issue. The learned Judge held, that the plaintiff had waived the objection by not taking it before the evidence of justification was gone into; but he reserved the point. Further evidence was given to prove the justification, which was fully made out, and a verdict was found for the defendant.

B. C. Friel having obtained a rule *nisi* for a new trial on the poin reserved.

C. B. Fisher now shewed cause, and contended that the objectio should have been taken before any evidence of justifiction was given that the defendant, having proved part of his justification, had right to prove the whole. If the objection had been taken on th opening, the defendant might have amended his plea. The case wa fully tried on the merits, and the plaintiff not prejudiced in any wa Brown *v.* Cunard (3 Allen, 316); Hughes *v.* Hughes (14 M. & W., 704.

Friel, contra, contended that he had a right to take the objectio at any time, and if the evidence given after, had been excluded, th plaintiff must have recovered.

RITCHIE, C. J.—The plaintiff's counsel should have taken the ex ception when the defence was opened; but he waited till the sho pinched. Though the granting new trials is discretionary, when th amount in dispute is so small, we ought not to send this case t another trial. The learned Judge informs us that the case ought t have been brought in a Justice's Court, if anywhere. It has bee decided that where the action should have been summary, the Cou will not grant a new trial.

ALLEN, J.—The plaintiff has not been prejudiced by the defendar going into evidence of his justification, as the case has been as full tried as if the plea had been special. If the objection had been take when the defence was opened, it would have been very differen but by allowing the defence to proceed, and cross-examining the wi nesses, I think the plaintiff has waived the objection. When th damages which, under any circumstances, the plaintiff could recove would be so trifling as they would in this case, even if the defendan had not proved a justification of the impounding, the Court ough not to send the case to a new trial; but to do so in this case woul only be putting the parties to unnecessary expense, as the defendan would amend his plea, and the result must be the same as the presen verdict. If the plaintiff thought her cow was wrongfully impounde she might have tried the question before a Justice at a trifling ex pense, under the Rev. Statutes, c. 61.

WELDON, J.—I am of the same opinion. Where the amount i controversy is so small, it would be beneath the dignity of the Cou to send this case to a new trial.

Rule discharged.

RANKIN and others *v.* HARLEY.

In an action by partners, brought after the act allowing parties in a cause to be examined as witnesses, it is not necessary to call the plaintiffs to prove the partnership: it may be proved by other evidence.

Evidence of a witness who had dealt with all the plaintiffs as partners, and purchased goods and settled accounts with the firm for several years. Held, Sufficient to prove partnership.

Assumpsit on an account stated, tried before ALLEN, J., at the York Sittings in January last.

The plaintiffs put in evidence an account in the following words: "John Harley, Esq., in account current with Rankin, Gilmour & Co., "Liverpool," and shewing a balance of £2,701 19s. 5d. due on the 31st December, 1866. At the foot was the following statement, signed by the defendant: "I have examined the above account, "showing a balance of £2,701 19s. 5d. due you on the 31st Decem-"ber, 1866, and find the same to be correct."

In order to prove the partnership of the plaintiffs, Mr. R. Hutchison was called as a witness, and stated that he knew the plaintiffs, who all resided in England and Scotland; that they carried on business in Liverpool under the name of Rankin, Gilmour & Co.; in London under the name of Gilmour, Rankin, Strang & Co,; and in Glasgow under the name of Pollok, Gilmour & Co.; that he had had dealings with the firm before December, 1865, and up to the present time; that he had dealt with all the plaintiffs individually as members of the firm of Rankin, Gilmour & Co., and knew, from his transactions with them, that they composed the firm; that some of the plaintiffs were members of the firm in Miramichi, in which he was a partner, and that the firm of Rankin, Gilmour & Co. were his agents in Liverpool; that he had direct correspondence with the managing partners of each of these firms, and had dealings and accounts with each of them for several years past, that if he was in London, or Glasgow, he would talk with the members of the firm residing in those places, about the Liverpool business, and had done so, and had transacted business with them in that way. He stated, on cross-examination, that if he had never had any information from the parties, he did not know that he could swear who composed the firm of Rankin, Gilmour & Co.

A verdict was taken for the plaintiffs by consent, with leave to the defendant to move to enter a nonsuit, if the Court should be of opinion that there was no evidence of partnership to leave to the jury. Accordingly in Hilary Term last, *Johnson* obtained a rule nisi for that purpose.

Fraser now showed cause, and contended that the law, allowi parties to be witnesses, could not alter the mode of proving partne ship, and that it was not necessary to issue a commission to take t evidence of the plaintiffs. The proof in this case was sufficie He cited Colly. Part., § 685; 2 Saund. Pl. & Evid., 684.

Wilkinson contra, contended that without the declaration of t plaintiff, Hutchison could know nothing of the members composi the firm. That either the articles of partnership should have be produced, or clearer evidence of acts given. It was in the power the plaintiffs to prove it properly.

WILMOT, J.*—I have no doubt in this case. The plaintiffs prov

*Ritchie, C. J., took no part in this case.

an acknowledged balance due by the defendant to Rankin, Gilmo & Co., and I think Hutchison's evidence proved that the plainti composed that firm. His evidence comes up to all the requiremen of the law. He stated that he would deal with any one of them members of the firm, and he proved acts of dealing in confirmati of his declaration.

ALLEN, J.—I think there was abundant evidence of partnership go to the jury, and to sustain a verdict for the plaintiffs. The c did not rest upon the statements of any of the plaintiffs to Hutc son; but he had dealt with them, purchased goods from them, a settled accounts with them as members of the firm, and knew th all personally in those transactions. He had peculiar means knowing who composed the firm.

WELDON, J.—I am of the same opinion. Hutchison's dealin with the plaintiffs were very strong evidence. I do not see h evidence could be much stronger. If the law did not allow the p ties to be witnesses, the partnership must have been proved as it w in this case; but because it might have been proved by the evidence some of the plaintiffs it does not compel them to prove it in that wa

Rule discharged.

The TRUSTEES OF ST. ANDREW'S CHURCH v. FERGUSON and anoth

APRIL 21st

Assumpsit lies for the use and occupation of a pew; and it is no defence under general issue, that other persons occupied the pew jointly with the defendant.

This was an action of assumpsit for the use and occupation of pew in St. Andrew's Church, Campbellton. Plea—the general issu

It appeared that the pew had belonged to, and been occupied by, the father of the defendant, and that after his death, both the defendants continued to occupy the pew in common with the other members of their deceased father's family. There was evidence that one of the defendants had, since his father's death, paid rent for the pew. At the trial before WELDON, J., at the last Restigouche Circuit, a nonsuit was moved for on the following grounds: 1. That an action for use and occupation would not lie for a pew. 2. That there was no joint occupation. A nonsuit was granted with leave to move to enter a verdict for the plaintiffs for £28, in case the Court above should be of opinion that the action was well laid.

Needham, in Michaelmas Term last, obtained a rule *nisi* for that purpose.

H. B. Rainsford shewed cause in Hilary Term. Use and occupation will not lie for the rent of a pew. Roscoe defines the action to be, to recover a reasonable satisfaction for lands, tenements, or hereditaments; a pew is neither of these and does not come within the definition. [RITCHIE, C. J.: Will you state what action would lie?] I am not bound to state that—it is sufficient to show that this one will not. Even if it would, there was no joint occupation shewn in this case. The other members of the family occupied the pew as they had done in their father's lifetime, and there was no hiring of the pew by defendants or other act to make them liable. ALLEN, J.; If other persons were liable, you should have pleaded the nonjoinder in abatement].

Needham contra. There is no doubt that an action for use and occupation will lie in this case. A pew is an incorporeal hereditament, and as such, comes strictly within the definition of Roscoe. The joint occupation of the pew by the defendants is not affected by the fact of other members of the family also occupying it. If a score of persons occupied the pew, I am clearly not bound to proceed against them all in such an action as this.

Cur: adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

The rule in this case was granted on two grounds: 1st, That an action for use and occupation of a pew would not lie. 2nd, That there was no joint occupation. The action is founded on the implied contract arising out of the defendants' occupation, and we cannot see what other action could be maintained except debt on simple contract, if there had been an agreement to pay a certain annual sum. In England the right to a pew is an incorporeal here-

ditament; and assumpsit lies for the use and occupation of an incorporeal hereditament. 1 Chit. Pl., 345; Mayor of Carmarthen v. Lewis (6 C. & P., 608). It also lies for the use and occupation of a watercourse and the water running therein. Davis v. Morgan (4 B. & C., 8). In 2 Chit. Pl., 36, a count for use and occupation of a pew is given, without any doubt or qualification. Without determining whether a pew in this country is an incorporeal hereditament, we think it is sufficient to say that it is a usufructuary right, for which an action of assumpsit may be maintained. On the other point, we think there is evidence that both defendants occupied the pew, and though other members of the family also occupied it with them, there is no objection under the plea in this case.

Rule absolute to enter a verdict for the plaintiffs.

NOBLE v. TEMPLE.

PELTON v. TEMPLE.

Where the Sheriff is interested, the jury process must be directed to the coroners of the county, if more than one; and though it may be executed by one coroner, the return must be in the name of the whole of them.

A *venire* directed to one of the Coroners of a county is bad, unless the others are interested.

A motion for a *venire de novo* may be made in the same manner as a motion for a new trial.

Plaintiff obtained a license to cut logs, and agreed with A. to cut and haul the logs put the plaintiff's mark on them and take them to the mouth of the Oromocto for him: plaintiff to furnish the supplies, pay the wages, and sell the logs at St. John; and after deducting stumpage, freight, supplies, &c., pay A any balance that might remain. Held, That A had no interest in the logs that could be seized under execution.

Where property claimed by the plaintiff is seized under an execution against A, and the plaintiff forbids the sale, he is not, by purchasing at the Sheriff's sale, estopped from denying that it was A's property.

In trespass, the plaintiff's counsel opened a case of absolute property in the plaintiff, but proved that the property was delivered to him as security for a debt. Held, sufficient to entitle the plaintiff to recover.

It is discretionary with the Judge at the trial to allow counsel to withdraw evidence. Per *Ritchie, C. J.*, that where evidence is admitted against the opinion of the Judge, it ought not to be withdrawn.

The first of these cases was an action of trespass against the Sheriff of York for seizing and taking away a quantity of spruce logs. The defendant justified the taking under an execution against George Noble.

At the trial before ALLEN, J., at the York Sittings after Trinity Term last, the defendant challenged the array on the ground that the *venire* was improperly directed to one of the Coroners of the County: the challenge was over-ruled and the cause proceeded. The question in dispute was, whether the logs seized by the defendant were the property of the plaintiff or of George Noble. It appeared that the plaintiff had obtained the license to cut the logs, and agreed with George Noble to cut and haul them, put the plaintiff's mark on them, and take them to the mouth of the Oromocto for him; the plaintiff to furnish George Noble with the necessary supplies and get the logs and pay the wages, and allow him what the logs sold for at St. John, after deducting stumpage, freight and expenses. The supplies, &c., were charged to George Noble. The logs were cut and hauled to the boom and the plaintiff's mark put on them by George Noble, and were seized by the Sheriff under the execution before the opening of the river. When they were seized, the plaintiff claimed them as his property and forbade the sale; and when they were sold, he purchased them, protesting, however, against the sale, and claiming them to be his.

The learned Judge directed the jury, that as the plaintiff was the licensee of the land on which the logs were cut, they would be his property when cut, and would remain so, unless there was something in the agreement between him and George Noble, to vest the property in the latter. That the mere fact of the supplies, &c., being charged to George would not of itself be sufficient to show that the logs belonged to him; and that he might agree to receive the net proceeds of the logs as a compensation for his labor upon them. If the real transaction was that the plaintiff obtained the license for his own benefit, and George Noble was employed as his servant in cutting or hauling the logs, the plaintiff was entitled to recover; but if there was a secret understanding between them, that the logs were to be held as George's property and to be protected from his creditors, and he had an interest in them, the defendant was justified in seizing. That if the plaintiff looked to the logs alone for payment of the supplies, and they were at his risk before they reached the Oromocto, they would be his property; but if George Noble would have been liable for the amount of the supplies in case the logs had been lost, His Honor thought they would be his property, and liable to seizure under the execution. That the plaintiff's having purchased the logs at the Sheriff's sale under the execution, did not estop him from denying that they were the property of George Noble, he having claimed them as his own. That if he had made no claim, but stood by, and seen the property sold under an execution against George Noble, and allowed a person to purchase, he

might have been estopped from saying that the property was n George's; but there was nothing in his conduct here to mislead an body. The jury found a verdict for the plaintiff, stating that Geor Noble had no interest in the logs that could be levied on.

In Michaelmas Term last, *Fraser* moved for a new trial on t ground of misdirection. 1st. In telling the jury that the plaintif bidding at the sale under the execution, was not an admission th the logs belonged to George Noble. 2nd. In not telling the jur that by bidding for the logs, the plaintiff had consented to the sa by the Sheriff, and therefore could not maintain trespass. 3rd. I not telling the jury, that the sole property in the logs was in Geor Noble; or, at all events, that he was a joint owner with the plainti and in either case, this action would not lie. Also, on the grou that the verdict was against the weight of evidence as to the owne ship of the logs. He also moved for a *venire de novo* on the grou of challenge taken at the trial.

The Court held that the direction was proper, and that the eviden warranted the finding of the jury as to the property in the logs. rule *nisi* was granted on the last ground only.

H. B. Rainsford shewed cause in Hilary Term last.

The second case was an action of trespass against the sheriff York, for seizing and selling a horse claimed by the plaintiff, an which seizure the defendant justified under an execution again Wm. Logan at the suit of Pat. Kirlin. The defendant challenge the array, on the ground that although the *venire* had been directe to the coroners of the County, it had been executed and returne by one coroner only in his own name, but the challenge was not su tained. The plaintiff's counsel, in opening the case, stated that I should prove that the plaintiff, having paid rent for Logan, he tran ferred the horse in question to the plaintiff, not as security, but his property obsolutely. The evidence showed that the horse w delivered to the plaintiff only as a security for the amount he had pa for Logan. The defendant having put in evidence the judgme and execution in the case of Kirlin *v.* Logan, the plaintiff's couns proposed to prove that the judgment was obtained by the fraud a misreprsentation of Kirlin, and that nothing more was due to hi from Logan at the time. The learned Judge was of opinion th the evidence was not admissible, but received it at the request of t plaintiff's counsel. The evidence given was of a conversation b tween Kirlin and Logan soon after the suit was commenced, a Logan stated that he understood Kirlin did not intend to proce

suit, and that judgment by default was obtained against urprise. At the close of the case, the plaintiff's counsel withdraw the evidence, which was allowed, subject to the s objection. Verdict for the plaintiff.

aelmas Term last, *Fraser* moved for a new trial on the misdirection and the improper admission of evidence; and *e de novo*, on account of the improper summoning of the contended that the case opened by the plaintiff's counsel, lute transfer of the property, was not supported by the [RITCHIE, C. J.: The question is, whether there was, in sfer of the horse to the plaintiff; not the object for which er was made. WILMOT, J.: Had the plaintiff the right of at the time the horse was seized?] The evidence to show the judgment was improperly admitted; but after being t could not be withdrawn. [RITCHIE, C. J.: It is discre- th the Judge whether he will allow evidence to be with- s a general proposition, I should say that where a counsel idence in, contrary to my opinion, he must stand by it. r practice].

iam.—Rule *nisi* on the ground of the objection to the jury.

n showed cause in Hilary Term last, and contended—1st. Court could not hear the case, because the challenge was rchment. Rex. *v.* Edmonds, (4 B. & Ald. 471). [RITCHIE, Judge reports the challenge to us, and we take his word e *nisi prius* record has never been brought into Court. ice always has been to bring up questions of this kind for a new trial]. 2nd. That the return of the *venire* ient. 3 Rev. Stat. 465, § 42; Bac. Ab. "Coroner" (F.); Sharpless, (2 Mod. 22).

contra, contended that though the jury process might be nd returned by one coroner, it must be done in the name hem. Tidd's Pr. 838; Rex. Dolby, (2 B. & C. 104), 4 Bac.

Cur. adv. vult.

, C. J., now delivered the judgment of the Court.

stion in the first of these cases is, whether a *venire* directed turned by, one coroner of a county, where there are several is sufficient; and in the second case, whether a *venire* the coroners of a County, can be executed and returned oner only, in his own name. It is clear that where the

sheriff cannot act, the *venire* must be directed to the *coroners*, i more than one. and not to any particular coroner, unless the other are interested; because they all make but one officer. R. *v.* War rington, (1 Salk 162; 1 Show. 329).

It is said in 4 Bac. Abr. 532, that where a *venire* was awarded t the coroners, and was returned by two coroners only, there being a the time of the award and return, four coroners, this was held to b error at common law; for coroners as ministers must all join, but a judges they may divide—citing Lambe *v.* Wiseman, (Hob. 70; s. Cro. Jac. 383). One coroner may execute the writ, but if there b more coroners than one for the County, the return must be in th name of all. Impey's Shff. 490; 2 Bac. Ab. 248; Rich *v.* Playe (2 Show. 286). A distinction is taken in the books between th judicial and the ministerial acts of coroners. Thus, it is said, th "wherever coroners are authorized to act as judges, as in the takin "of an inquisition of death, or receiving an appeal of felony, & "the act of any one of them who first proceeds in the matter, is "the same force as if all had joined in it. Also, it is certain th "where coroners are empowered to act only ministerially, as in t "direction of a process directed to them, upon the default or in "pacity of the sheriff, all their acts will be void wherein they do n "all join." See also 2 Bac. Ab. 248; 6 Vin. Ab. 247, 254. We a unable to understand the reason for this distinction; and in t absence of any authority on the point, should have been inclined think, that when acting ministerially, the act of one coroner wou have been sufficient, (as indeed it would, if the return had been the name of the whole), but we feel bound to adhere to the law laid down, without any variation, for upwards of two centur though we may not be convinced of the reasonableness of it. T result is, that there must be a *venire de novo* in each of these ca We understand that an Act was passed at the last session of t Legislature to remedy, for the future, the inconvenience that mi result from our decision in these cases. (*a*)

(*a*) By Act 31 Vict., c. 26, the *venire* may be directed to any one of the coron when the Sheriff is interested.

DOAK, Administrator, &c., *v.* ROBINSON.

Defendant, by writing, promised to pay A, "or her heirs," a certain sum of mone On the death of A, the right to recover the money vests in her personal represen tive, and not in her heirs.

Semble—that the instrument is a promisory note.

Assumpsit on a written instrument signed by the defendant,

the following words:—"For value received I promise to pay Mrs. "Robert Doak, Senr., or her heirs, the sum of ninety-six pounds, "thirteen shillings, currency, with interest till paid. Doaktown, "22nd Sept., 1861." The declaration contained a count upon it as a promissory note, and also on an account stated. Plea non assumpsit. At the trial before ALLEN, J., at the York Sittings in January last, it appeared that the plaintiff claimed as the administrator of Jane Doak, the person named in the note, and who was his mother. He stated that after the death of Jane Doak the defendant came to him and spoke about paying some money on the note, but did not pay anything, and said he had not the amount of the plaintiff's share of it, a verdict was found for the plaintiff on the account stated.

In Hilary Term last *Johnson* obtained a rule *nisi* for a new trial on the ground of misdirection.

Gregory now showed cause, and contended that the instrument was a promissory note, and that the words, "or her heirs" were surplusage. If it was not a promissory note, the action was properly brought by the administrator, in whom the right to recover vested on the death of Jane Doak. (Wm's. Exors. 3 ed. 701; 11 Vin. Ab. 132).

Wilkinson, contra. The instrument being payable to Mrs. Doak, or her heirs, in the alternative was not a promissory note. There was no account stated with the plaintiff, if with any person, it was with Mrs. Doak.—The administrator has no right to sue.

RITCHIE, C. J.—Referred to Holmes *v.* Jaques (Law. R. 1 Q. B. 376), and said he thought the instrument was a promissory note. That the case of Devon *v.* Paulett, cited from Viner's abr. was conclusive to show that the action was properly brought by the administrator. There the promise was to pay a sum of money to the intestate, his heirs or executors; and it was resolved that the thing contracted for being a personality, the executor, and not the heir, should have it.

ALLEN, J.—Said that he took that view of it at the trial. That though the money might belong to the heirs, still the right to recover it would vest in the personal representative of Mrs. Doak, and he would hold it as a trustee for the heirs.

WELDON, J., concurred.

Rule discharged.

LINGLEY *v.* THE QUEEN INSURANCE COMPANY.

A widow having continued, for four years after her husband's death, in poss a house built on land of which he was the lessee for years, and paid the grou insured the house in her own name. No administration was taken out on j band's estate. Held, that she had an insurable interest—1st, as the pres owner of the house; 2nd, as executrix *de son tort;* 3rd, as the widow un statute of distribution.

The house was insured for £250, and proved to have been worth at least £400. that if the plaintiff was only entitled, as widow, to half the estate, there an over valuation.

This was an action on a policy of insurance on a house for dated the 19th November, 1864, tried before WELDON, J., at t St. John Circuit. The plaintiff was a widow whose husbar died intestate in 1860, being at the time the lessee, for a term of of the land on which the house stood. No administration was g on his estate, but the plaintiff continued to occupy the hous paid the ground rent—no claim appearing to have been made property by any next of kin to the husband. The house was l in December, 1864, and when the plaintiff claimed the insu the agent of the Company declined to pay until she procurec writing from the heirs of her deceased husband, relinquishing rights. She furnished certain papers which were laid befc solicitors of the company, who advised that she should be pa the amount insured; but she refused to receive less than the sum, which the agent some time afterwards promised she shc paid. A new agent was appointed, and the company refused the claim, on the ground that the plaintiff had no insurable ir There was evidence that the house was worth not less than Verdict for the plaintiff, £250. In Hilary Term last, S. R. son, Q. C., obtained a rule *nisi* for a new trial on the groun That the plaintiff had no insurable interest. 2. If she had a terest it was only to the extent of one-third of the value property, and therefore there was an over insurance.

Wetmore, Attorney General, shewed cause on a former day term. 1. An insurable interest does not necessarily imply pr and an insurable interest may be proved in the assured, withc evidence of any legal or equitable title to the property i Angell on Ins., § 56. The plaintiff had at least an equitable i in the property insured, under the Statute of Distribution, extent of one-third, and to one-half if there were no child Rev. Stat., 282. There is no contention by the defendant th property was over-valued, and they have not shewn that it v worth more than double the sum insured. The fact of the p being in possession of the property insured as the apparent

is sufficient to give her an insurable interest under the authority of Marks v. Hamilton (7 Exch., 323; 9 Eng. R., 503). The plaintiff not having taken out letters of administration, and being in possession of her deceased husband's property, was liable, as executrix *de son tort*, for his debts, and therefore entitled to insure the property for her own protection.

S. R. Thomson, Q. C., contra. The plaintiff had clearly no title to the property insured, and no insurable interest; for such an interest must be clear and tangible: her interest was merely speculative —Angell Ins., 120. [RITCHIE, C. J.: Had she not, at least, the right of a trespasser, being in possession?] No; for her holding the property was similar to that of a tenant who acknowledges title in another. [RITCHIE, C. J.: Might not a tenant insure?] Possibly a tenant for a term of years, who was liable for rent, might do so. In any case she is only entitled to one-third, and the Court are bound by the valuation of the witness who swore that the property was worth $1,600.

Cur. adv. vult.

WILMOT, J., now delivered the judgment of the Court.

This was an action on a Policy of Insurance, dated the 19th Nov., 1864, whereby the plaintiff was insured to the amount of £250 on her one-and-a-half story building, situate on the east side of the road leading to Rankin's Mills, &c., from 19th Nov., 1864, to 19th Nov., 1865. The building was destroyed by fire in December, 1864. The preliminary proof was duly made and handed to the agent of the company, Mr. Stymest. In consequence of information received, he deferred paying the loss until the plaintiff procured some documents from the heirs of her deceased husband. These were furnished and laid before the counsel of the company, who advised that the plaintiff should be paid one-half the amount insured, which the agent offered to pay; but as the plaintiff declined to receive less than the full amount, the agent subsequently said the amount would be paid, and told Mr. Lingley he would settle the same. Stymest having been removed from the agency, and another person appointed, who failed to pay the amount, this action was brought. The land upon which the house stood was leased to the plaintiff's husband, who died in 1860. The plaintiff retained possession from that time, and paid the ground rent. No administration appears to have been taken out on the husband's estate, nor any claim to have been made against the plaintiff on behalf of any of the next of kin. One of the witnesses stated that the value of the house was not less than £400, but how much more it was worth, did not appear. The defendants

contend—1. That the plaintiff had no insurable interest. 2. Tha if she had there was an over-valuation to the extent of £50.

We are of opinion, on several grounds, that the plaintiff had an in surable interest. The possession by her for six years, and the payin of the ground rent during that time, without any claim or interferenc on behalf of any legal representative of the deceased husband, afford a strong presumption that the house belonged to the plaintiff, whic would establish an insurable interest. But, admitting that the hous would constitute a portion of her husband's estate, the plaintiff in curred responsibilities as executrix *de son tort*, and she would there by be answerable to those who were interested in the estate; an for this reason, under the authority of Marks *v.* Hamilton, (7 Exch 313), she had a sufficient insurable interest. As widow also, th plaintiff would have an equitable interest in her husband's estat which would entitle her to recover, and which the defendants' agen on the advice of their solicitor, admitted would amount to at leas one half the sum insured, and which he offered to pay. If th plaintiff was only entitled to recover one half, we do not think ther was an over-valuation, there being no evidence of the exact valu the defendant having given no evidence on this branch of the cas We are therefore not prepared to say that the house was not wort £500. For these reasons we think that the plaintiff is entitled t retain her verdict.

Rule discharged.

THE COMMERCIAL BANK *v.* WILLISTON and another.

H. gave the defendant a promissory note for the price of goods purchased from hi which note the plaintiff discounted for the defendant, who received the proceed when the note became due, it was renewed by H., and the new note indorsed by th defendant and held by the plaintiff. Held, that this was only an extension of th time for payment, and did not alter the original liability of the defendant as indorse

Before the renewal of the note, H., who was largely indebted to the plaintiff, as th drawer of a number of other notes, paid the plaintiff a sum of money withou making any appropriation of it; he soon afterwards asked the plaintiff to give hi credit for it, for the benefit of his indorsers; but the evidence left it uncerta whether it was for the benefit of his accommodation indorsers only, or for his i dorsers generally, and a verdict having been given for the plaintiff for the amou of the note, without any deduction on account of the money paid by H., a new tri was granted, in order to ascertain whether the indorsers generally were entitled t participate in the payment by H. It being the defendants' duty to establish th fact, the new trial was granted on payment of costs.

This was an action against the defendants as indorsers of a promi sory note, drawn by one J. Haws in their favor, dated the 27th Jul 1865, tried before Weldon, J., at the York Sittings in July last.

te was a renewal of a former note between the same parties, Haws for goods purchased from the defendants, and upon y obtained the money from the bank. When the original ne due, it was renewed by the note now in suit; and it d that the manager of the bank stated at the time the s indorsed the note, that the bank would be obliged to pay ne 21st July, 1865, Haws, who then owed the bank about n notes which were indorsed by various parties for his ation, and also a large sum on bills of exchange drawn on England, paid into the bank the sum of $7,000 without ny particular appropriation of it. A few days afterwards, it to the Bank, and (according to his evidence) said to Mr. the cashier, respecting the $7,000,—"Give me credit for it nefit of the indorsers,"—that Winslow said "For the accom- indorsers?" and that he (Haws) said "yes," that it was not he credit of Wright's bills, meaning the bills of exchange England. It also appeared that one J. Sheriff, who was r on notes for Haws, had sold a vessel belonging to Haws, f the proceeds, paid the notes on which he was liable as nd paid the balance, $8,000, into the bank, to the credit Sheriff & Co.

ct having been found for the plaintiffs for $1,115, A. L. C., obtained a rule *nisi* for a new trial in Michaelmas , on the ground of misdirection as to the appropriation of); or, to reduce the verdict.

re, Atty. Gen., and *Johnson* showed cause in Hilary Term ending that the defendants were not accommodation in- nd therefore not entitled to the benefit of any part of the en if there was an appropriation of it by Haws; but that no such appropriation.

Palmer, Q. C., contra, contended that the defendants had he note for the accommodation of the bank, and were dis- y time for payment having been given to Haws by the of the bank. [The Court said there was no extension of he letter of the president]. That the $7,000 should be *ro rata* for the benefit of all Haw's indorsers. That the on the plaintiffs to show who were entitled to participate 000.

Cur. adv. vult.

J., now delivered the judgment of the Court.

The plaintiffs in this case made out a *prima facie* right to re the amount of the note and interest, and the only question is wh the defendants have shown any right to participate in the appro tion of the $7000, paid by Haws on the 22nd July, 1865, we l clearly of opinion that they have no claim on the money paid the bank by Sheriff, to the account of J. Sheriff & Co.

We are also of opinion that the defendants were not accomm tion indorsers in the legal or commercial sense of the term. note, of which the one now in question is a renewal, was giv the defendants by Haws for goods purchased from them, and obtained the money upon it from the bank. When the note be due, it was renewed, and again indorsed by the defendants. was nothing more than an extension of the time for payment did not alter the character or the liabilities of the respective pa As to the appropriation, Mr. Winslow, the cashier of the bank, in his evidence that Haws did not make any appropriation o $7,000, when he paid it; and Haws confirms this. Nor was any appropriation by the bank at that time. We have looked fully at the learned Judge's notes; and the evidence of the al subsequent appropriation, as given by Haws, the only witness speaks to it, is so vague and ambiguous that we are utterly at to say whether the appropriation then made and assented to by Haws and Winslow, was for the benefit of Haws' "accommod indorsers" alone, or for their benefit and that of the defendants wise, or for his indorsers generally. To settle this question sat torily, the case requires further investigation; but we think the trial must be on payment of costs, as this should have been clear by the defendants, if they wished to avail themselves special appropriation in their favor. An affidavit was produce the plaintiff's counsel on showing cause, (and not objected to), s ing a list of all the indorsers on Haws' notes, held by the ba the time he paid the $7,000, not distinguishing the accommod indorsers. According to this statement, if all Haws' indorser entitled to participate in the appropriation, it appears to us tha plaintiff's claim on the note would be reduced to $580.

Mr. Palmer contended that *all* the indorsers were entitled to *pro rata* in the $7,000, and also in the amount paid by Sheriff the latter, we have decided the defendants were not entitled. T fore, if the plaintiff's consent within thirty days after service o rule, to reduce the verdict to $580, the rule *nisi* for a new tria be discharged, otherwise it will be made absolute on payment of

Rule according

ALWARD *v.* SHARP.

Where a bill of indictment laid before the Grand Jury was returnd by them into Court with an indorsement, "The Grand Jury recommend no bill," and it is entered in the minutes of the Court as "no bill," and no further proceedings are taken against the party, it is a termination of the prosecution.

Where inferences are to be drawn from the facts proved in an action for malicious prosecution, the case must be left to the jury; and the question of "probable cause" should not be determined by the Judge alone.

Any motive for a prosecution, other than that of wishing to bring a guilty party to justice, is evidence of malice. Retaining the clerk of the peace to prosecute an indictment against the plaintiff, before the Sessions, together with the conduct of the prosecutor before and after, are proper matters to be left to the jury on the question of malice.

This was an action for malicious prosecution, tried before ALLEN, J., at the last Queen's Circuit. The plaintiff and defendant both claimed a lot of land on which the plaintiff lived, the plaintiff claiming on the ground that the defendant's father had put him in possession and agreed to sell it to him; and the defendant under a deed from his father, given after the plaintiff had gone into possession. The plaintiff refused to give up possession, and on several occasions had taken away fence-poles from the fences on the land and used them for fuel. The defendant, failing to get possession of the land, put up a fence across the lot in 1866, which the plaintiff pulled down and burned during the summer and autumn. In November following the defendant made complaint before a Justice of the Peace, that he had evidence to prove that the plaintiff was seen feloniously taking and carrying away his (defendant's) fencing from his land. On this complaint he requested the Justice to issue a warrant against the plaintiff. The Justice endeavored to dissuade him from taking a warrant, but he made a second application, and a warrant was issued, under which the plaintiff was arrested and brought before the Justice, who, after examination, ordered him to be committed for trial at the Sessions, and the plaintiff entered into recognizances to appear. The defendant then applied to the Clerk of the Peace, and retained him to look after the indictment against the plaintiff, stating that he did not want the matter neglected. A bill of indictment against the plaintiff was sent before the Grand Jury at the Sessions, and the defendant and other witnesses were sworn and gave evidence before the Grand Jury. They returned the bill of indictment into Court, with the following indorsement thereon signed by the foreman:—"The Grand Jury recommend no bill," upon this an entry was made in the minutes of the Sessions as follows:—"The Grand Jury come into Court and present indictment for larceny—The Queen *v.* Daniel Alward—no bill." Nothing further was done in the matter, and some days after the Sessions ended, the defendant complained to one of the grand jurors that they had not used him

right, and said that the evidence given before them was sufficient to indict the plaintiff.

A non-suit was moved for on the grounds—1st. That the prosecution was not terminated. 2nd. No evidence of malice. 3rd. No evidence of want of probable cause. The learned Judge reserved the first point, with leave to move to enter a non-suit; but on the third point he considered that there were certain inferences which might be drawn from the facts, and which must be determined by the jury, and therefore he should not determine the question of probable cause. In leaving the case to the jury, His Honor told them on this point, that if there was probable cause for laying the information before the Justice, the defendant was not liable, though he might not have been actuated by proper motives in making the charge. If the defendant honestly and fairly believed, and had reasonable grounds for believing, at the time he made the complaint that the plaintiff had stolen his fence, he was not liable in this action, though the taking might not have amounted to stealing, but was a mere trespass—the subject of an action for damages which he (the Judge) thought it was. Did the defendant, from the information he received, really believe that the plaintiff had stolen the poles and did he make the complaint and carry on the prosecution under that belief; or was his object, in taking the proceedings, not for the purpose of prosecuting a person whom he believed to be guilty of a crime, but for the purpose of compelling the plaintiff to give up possession of the land in dispute, and save himself the trouble and expense of an action of ejectment? If the first was his object, he had probable cause and was entitled to a verdict; but if the latter, he had no probable cause for the prosecution, and the plaintiff was entitled to recover. He pointed out to the jury that the taking of the poles, with one exception, was in the daytime, and in sight of the defendant's house, and the house of another person, without any attempt to conceal it; and the improbability of such a taking having been with a felonious intent. That the question in this case was not the ownership of the land, or of the fencing, nor whether the plaintiff was justified in taking the poles; but whether the defendant really believed that the plaintiff had stolen them. That the plaintiff must prove both malice and the want of probable cause that malice might be either actual or implied; and if defendant had no probable cause for making the complaint, they might thereby infer that it was done maliciously. That he thought the defendant's employing the Clerk of the Peace to prosecute the indictment was evidence of malice; that he should have left the case in the hands of the public authorities of the County, and not interfered beyond attending the Court to give evidence. His urging the Justice to

issue the warrant, and his complaining to the Grand Juror because the indictment was not found, were evidence to shew that his motive in carrying on the prosecutien, was not merely to bring to justice a party whom he believed to be guilty of a crime. Verdict for the plaintiff—damages $80.

D. S. Kerr, Q. C., on a former day in this term, moved for a rule *nisi* for a non-suit on the point reserved; or for a new trial on the grounds of misdirection, and that the verdict was against evidence. 1. The allegation in the declaration, that the plaintiff was discharged as to the larceny, is not proved by the endorsement on the indictment by the Grand Jury. That was not a proper ignoring of the bill, and is, in fact, a nullity. It is a rule that the finding of a jury must be absolute. The mere recommendation of the Grand Jury is not a sufficient termination of the proceedings. 1 Chit. Cr. L. 323; 4 Bla. Com. 305; Lord Cromwell's case (Yelv. 15). 2. There was no evidence of want of probable cause. The plaintiff had no title to the land, and the defendant was justified in regarding his taking the poles as larceny. 3. The learned Judge was wrong in telling the jury, that the fact of the defendant having retained the Clerk of the Peace to prosecute the defendant, was evidence of malice. Malice in law means the doing of a wrongful act; and the retaining of counsel by the plaintiff was certainly not such an act. The verdict was against evidence; the defendant laid his case before a justice who issued his warrant. When a party lays a case, which he thinks amounts to felony, fairly before a magistrate who issues his warrant, no action will lie for malicious prosecution. Lee v. Webb (3 Esp.)

Cvr. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

We think there is no ground for a rule in this case.

The first point was, that no termination of the proceedings had been shewn, as the Grand Jury had not ignored the bill, the endorsement thereon being in these words: "The Grand Jury recommend no bill." But this clearly amounts to an ignoring of the bill, it is equivalent to their saying that there was not evidence to warrant them in finding a true bill. The Court of Sessions in acting on this, treated it as an ignoring of the bill, and no further proceedings were taken. It was not necessary that the plaintiff should be formally discharged by proclamation. He was under recognizance to appear at the Sessions and answer such bill of indictment as should be ad against him on the charge preferred; and when the Grand y ignored the bill and the Sessions entered it of record as they

did, and the Session of the Court terminated, he was discharged b law, and the proceedings against him were at an end. The entry i the Minutes of the Sessions therefore proves the allegation in th "declaration, that "it was then and there considered by the sai "Court that the said plaintiff of the premises in the said indictmen "specified, should be discharged and go thereof without day; as b "the record &c. appears." Secondly, misdirection in not telling th jury, that there was evidence of probable cause. The Judge de clined to decide this question, because he thought from the fact o both parties claiming a right to the possession of the land, and th circumstances under which the poles were taken by the plaintif that they were certain inferences which might be drawn from th facts, and which must be determined by the jury; and whether th defendant had or had not probable cause, depended on the fac whether the plaintiff stole the poles. or on the defendant's believin and having reasonable ground for believing, that he did so. Hi motive in making the charge was not a question of law, but a fac to be determined by the jury. Taylor v. Willans (2 B. & Ad., 857) Panton v. Williams (2 Q. B., 194). The Judge told the jury wha would or would not be probable cause, according to the inferenc they might draw from the facts, of the defendants motives and be lief in making the charge; and we think this question was properl left to the jury. Thirdly, misdirection in telling the jury that th defendant's retaining the Clerk of the Peace to prosecute the indict ment, was a circumstance from which they might infer malice; a the defendant should have left the matter in the hands of the Cler of the Peace as prosecuting officer at the Sessions, and shoul not have interfered beyond what was necessary to discharge the ob ligation he was under, to appear and give evidence. This was on of the facts to be left to the jury, from which they might infer mal ice if there was no probable cause; and though, perhaps, not alon sufficient proof of a malicious motive, was properly left to then with the other facts, namely,—the application of the defendant t the justice for the warrant on two occasions; the endeavor of th justice to dissuade him from taking the proceedings; and the subse quent complaint of the defendant to one of the Grand Jurors, tha they had not done right in ignoring the bill against the plaintif "The conduct of a party—says Lord Tenterden in Taylor v. Willan "—in a late period of a cause, is a material circumstance from whic "his motives at an earlier period may be inferred." The jury had right to consider all the circumstances in determining the questio of malice, and therefore we think there was no misdirection on thi point. Fourthly, that the verdict was against evidence. We thin there was abundant evidence of malice; not merely of malice implie

from the want of reasonable and probable cause, but of actual malice. In Stevens v. the Midland Counties Railway Company (10 Exch. 352) it is said that any motive, for a prosecution other than the simple one of wishing to bring a guilty party to justice, is a malicious motive in law. This principle was acted on in the case of Burgoyne v. Moffatt, decided in this Court in Hil. T. 1861. It was also the rule laid down for the guidance of the jury in the present case, and we think it was quite open to the jury to come to the conclusion, that the defendant's motive for the prosecution was to force the plaintiff to give up possession of the land, and not simply a desire to bring a guilty party to justice.

Rule refused.

VINCENT v. WEST.

It is not essential to the maintenance of an action for malicious prosecution for a crime, that a warrant should have been issued against the plaintiff and that he should have been arrested. It is sufficient that he has been proceeded against by summons on the defendant's complaint. Where the declaration alleged that a warrant had been issued against the plaintiff, and that he had been arrested on the charge, an amendment was allowed, substituting therefor, that a summons had been issued by a Justice of the Peace and served upon the plaintiff, and that he attended before the Justice in obedience thereto.

When the evidence, tending to shew whether the plaintiff was or was not guilty of the crime charged against him, is conflicting, the Judge cannot determine the question of "reasonable and probable cause."

This was an action for malicious prosecution on a charge of perjury, tried before ALLEN, J., at the last Queen's County Circuit. The declaration stated, in the ordinary form, that on the 15th March, 1867, the defendant went before Henry Todd, Esq., a Justice of the Peace for Queen's County, and falsely and maliciously, and without any reasonable or probable cause, charged the plaintiff with having committed perjury in giving evidence, &c., and with having falsely and maliciously, &c., caused the said Justice to grant his warrant for the apprehension of the plaintiff upon such charge; that the defendant, by virtue of the said warrant on the 16th March, wrongfully, &c., caused the plaintiff to be arrested, and conveyed in custody before the said Justice to be examined on the said charge, who, after hearing the evidence, adjudged and determined that the plaintiff was not guilty of the said supposed offence, and caused him to be discharged out of custody, and fully acquitted of the supposed offence; and that the defendant had not further prosecuted the said complaint and prosecution, but wholly abandoned the same, and the prosecution was wholly ended and determined. The information was lost, but

the Justice before whom it was sworn, stated that it charged positively that the plaintiff had committed perjury in giving evidence on two occasions specified. At the defendant's request, a summons was issued against the plaintiff on this information. He attended before the Justice on the 16th March, 1867, and the defendant also attended with witnesses, and after hearing the evidence, the Justice dismissed the complaint, stating, in the presence of both parties, that he could see no reason for committing the defendant (Vincent) for trial, and that he consequently discharged the case. The minute made by him of his decision on the depositions, was, "No cause of action." The defendant being dissatisfied with the result, applied to the Justice for a copy of the proceedings, stating that he intended to carry the case further; but the Justice did not consider that he was bound to give a copy, and declined doing so. No further proceedings were taken against the plaintiff. The defendant (who was a Justice of the Peace) was examined as a witness, and swore that he wrote the information and took it to Justice Todd, and that it stated that he "suspected" the plaintiff had committed perjury. He also stated that in May after the examination, he had written a letter to the Attorney General (which was put in evidence) detailing the proceedings against the plaintiff before the Justice; that he had not received any answer to the letter till a short time after the trial; that he had gone to Fredericton and seen the Attorney General, and consulted with him about the matter, and acted under his instructions. He denied having any malicious motive in making the charge against the plaintiff, and stated that he did it for the protection of the public; that he believed, when he made the complaint, and also at the time of giving his evidence, that the plaintiff had committed perjury as he was charged in the information. The charge of perjury arose out of a claim made by the plaintiff against the defendant for wages on an alleged hiring—the defendant contending that the hiring was by one Green, and that he (defendant) had only guaranteed the payment of the plaintiff's wages on certain conditions which had not been performed by the plaintiff. The suit for wages had been tried twice—once before a Justice of the Peace, when a verdict was given for the plaintiff, but the judgment was reversed, the amount being beyond a Justice's jurisdiction; and again, at the Circuit Court in 1867, when the plaintiff again obtained a verdict. In the present case, the plaintiff swore positively to the hiring by the defendant, and the defendant denied it. Both parties called witnesses to corroborate their respective statements. On the application of the plaintiff's counsel, the declaration was amended by striking out the allegation of the issuing of the warrant and the arrest of the plaintiff, and substituting therefor the issuing of a summons

and serving the plaintiff therewith, and his attendance, in obedience to the summons, before the Justice—the defendant's counsel having leave to move to enter a nonsuit if the amendment ought not to have been made, or, if the declaration, as amended, disclosed no cause of action. The learned Judge directed that an action for malicious prosecution would lie though the plaintiff had not been arrested. That in order to recover, the plaintiff must make out that the plaintiff had no probable cause for making the charge, and that he was actuated by a malicious motive. If the defendant, in making the charge against the plaintiff, from his own knowledge of the transaction between them, and from what had been sworn by Green and other witnesses on the several trials, honestly believed, and had reasonable grounds for believing, that the plaintiff had wilfully sworn falsely about the hiring, he had probable cause for making the charge and would not be liable in this action, though the plaintiff did not, in fact, commit perjury. But if the information which he himself possessed, and what he got from the evidence of other witnesses examined on the trials, was not such as to warrant a prudent, cautious man, in believing that the plaintiff had committed perjury, then he had not probable cause for making the charge, and would be liable if he acted from malicious motives. Whether the defendant had reasonable grounds for believing the truth of the charge would depend, in a great measure, upon, whether they believed the evidence of the plaintiff, or of the defendant and the other witnesses who swore that the hiring was by Green, and whether the circumstances were such as to justify the defendant in believing that the plaintiff had sworn falsely. If there was no probable cause, the jury might infer that the defendant acted maliciously; but they were not bound to do so. They must consider the defendant's object in making the charge. Was it for the purpose of bringing to justice a party whom he believed to be guilty of the crime of perjury; or was it for the purpose of gratifying any ill feeling against the plaintiff because he had recovered a verdict for the wages? If the latter was his motive, it would be evidence of malice; and in that case, his following the matter up by communicating with the Attorney General, was a material fact. But if he really believed the plaintiff to be guilty, he did no more than his duty in applying to the Attorney General. As to damages—though the plaintiff had not been put to much expense or sustained actual damage—if a verdict was given for him, he was entitled to damages for the injury to his character in being charged with a serious crime. Verdict for the plaintiff $35.

D. S. Kerr, Q. C., now moved to enter a nonsuit on the point reserved; or for a new trial on the grounds of misdirection, and that

the verdict was against evidence. The amendment ought not to have been allowed. The gravamen of the charge in an action of this nature, is the arrest—without that, this was only an action of slander. In Gregory v. Derby, (8 C. & P. 750), Pattison, J., said that if the plaintiff was never apprehended, no action for malicious prosecution would lie. There must be a deprivation of liberty: no action will lie unless there has been an arrest. Amer. Leading Cases, 208. [WELDON, J.: In Western v. Beemen, (3 H. & N. 916), a summons only was issued against the plaintiff. RITCHIE, C. J.: Hewlett Cruchley, (5 Taunt. 277), is opposed to your position that no action will lie unless there has been an arrest. There, the defendant went before the Grand Jury and preferred an indictment against the plaintiff, without any previous arrest, and the plaintiff, hearing of the indictment, voluntarily surrendered to take his trial]. There was no evidence of malice or the want of probable cause. [RITCHIE, J.: How could the Judge in this case rule that there was or was not probable cause? All the facts must be left to the Jury.] It was a misdirection to tell the jury that the defendant's letter to the Attorney General was evidence of malice. [ALLEN, J.: I did not say it was evidence of malice if the defendant believed the plaintiff was guilty of perjury, and his object was to bring him to justice.] The damages were excessive. The plaintiff only proved that he had incurred an expense of about two dollars in attending the summons.

RITCHIE, C. J.: There is no ground for a rule. Our minds are clearly settled upon the law in cases of this kind. The amendment was one peculiarly contemplated by the Statute. The effect of it was only to allow the point in litigation between the parties to be tried, and the defendant was not in any way damnified by it, as his defence was the same, whether the proceeding against the plaintiff was by warrant or by summons; and there is no affidavit from him that any injustice has been done by the amendment. I also think there was no misdirection. I think the Judge put the case to the jury on the question of reasonable and probable cause. with great care and precision; ruling strictly, accurately, and with great discrimination. It is always a difficult matter to instruct the jury in cases of this kind, and in no case more difficult than on charges of perjury. There is nothing more fallible than human memory; therefore a man should be very careful in making a charge of perjury. It is very laudable in a man to vindicate the law; but in doing so he must take care that there is no personal feeling involved in it, particularly where his own oath is mixed up with the transaction, swearing against the party he accuses, oath against oath, as it were. Here the defendant had the decision of a Justice and a jury against

ore he made the charge, so that he ought have been upon his
It was not for the Judge to determine whether there was
ble and probable cause in this case, and though I might not
rived at the same conclusion as the jury did, still I cannot
y were wrong. Having found that there was no reasonable
able cause for making the charge, it was open to them to find
was malicious. If a new trial were granted on the ground
verdict being against evidence, it could only be on payment
; and I think we should be doing a great injury to the parties
ing it to another trial. It cannot be said that the damages
essive. As the jury, to give the verdict, must have found
n the defendant, I think the damages are moderate.

DON, J.: I am of the same opinion. It is clear that an action
kind will lie, though the plaintiff has not been arrested.
estion to be tried was, whether the prosecution was malicious,
hout reasonable or probable cause: the amendment, there-
s proper, because it enabled the parties to try that question.

N, J.: At the trial, I did not recollect any case where an action
cious prosecution had been maintained unless the plaintiff had
rested; but I could not understand, upon principle, why it
ot be, if malice and want of probable cause for the prosecu-
re made out. I directed the jury as favorably for the de-
as I thought I was justified in doing, and rather expected
e verdict would have been in his favor; but the credibility of
nesses was for the jury, and I cannot say they have done

Rule refused.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NEW BRUNSWICK,

IN TRINITY TERM.

IN THE THIRTY-FIRST YEAR OF THE REIGN OF QUEEN VICTORIA.

KEY *v.* THOMSON.

In an action against the defendant for negligence as a surgeon, in his treatment of the plaintiff, whose hands and feet had been amputated in consequence of his having been frozen, it was proved by the plaintiff that when the defendant first visited him, he said that the plaintiff would not lose any of his limbs. Held, That a statement made by the defendant on the same occasion, to another person in the house where the plaintiff was, that he would lose his hands and feet, was evidence for the defendant as part of the *res gestæ* it appearing that his practice was always to encourage his patients, and prevent a depression of their spirits.

When the plaintiff gives the evidence of medical men as to the proper treatment of cases of frozen limbs, the necessity of frequent visits, and their practice in particular cases; the defendant may give evidence of the treatment of other cases of a similar character, and of the results, in order to rebut the inference of negligence arising from the evidence on the part of the plaintiff.

When evidence is tendered, the Judge has a right to ask the particular purpose for which it is offered, and if the counsel refuses to state it, he may reject it.

In an action against a surgeon for negligence in treating a patient, whereby it was alleged that he lost his hands and feet, a verdict was given for the plaintiff for $25,000. Held, That the damages were excessive, the jury having found, that without any negligence, the plaintiff would have lost a portion of his hands. In such a case, the Court ordered a new trial, though the plaintiff was willing to assent to reduce the amount of the verdict.

This was an action for alleged negligence and inattention on the part of the defendant, as physician and surgeon, in his attendance

on and treatment of the plaintiff, whose hands and feet had be severely frozen, whereby he suffered more pain than he would ha done had his case been properly attended to by the defendant, a ultimately lost by amputation a portion of his hands and feet, whi might and would have been saved to him, had he received prop treatment and attention at the hands of the defendant.

At the trial before ALLEN, J., at the last Charlotte Circuit, it a peared that on the evening of the 23rd Dec., 1865, the plaintiff l his way in going from St. George to Le Tete, and after wanderi about for several hours, he reached the house of a person nam Gamble about midnight. It was found that his hands and feet w severly frozen, the hands were stiff and sounded like hard substan when they were knocked together. The defendant was sent for next morning, and came to the plaintiff; dressed his hands and f and gave directions for his treatment. The plaintiff asked him extent of his injuries, and, according to the plaintiff's evidence, defendant said that the plaintiff would not lose a joint, and wo be all right in about six weeks. The defendant denied telling plaintiff that he would not lose a joint; but stated, that in order keep up his spirits, he told him he "would be well enough yet;" he did not think it proper always to tell his patients his true opinio of their state; and that he formed the opinion on his first visit t the plaintiff, that he would lose his fingers and toes, though he coul not tell at that time to what extent his feet would be saved. C the part of the plaintiff, the evidence of several surgeons was give as to the extent of the freezing of the plaintiff's limbs, whether was only superficial, or whether his hands and feet were complete frozen through, and vitality destroyed; and whether, in the latt case, they could have been saved by proper attention and treatme These witnesses formed their opinions from the plaintiff's stateme in giving his evidence, not one of them having seen him till upwar of a month after he was frozen. They stated that in such a ca they would have considered it necessary to visit the plaintiff fr quently—some said every day or two, others every two or thr days, in order to watch the progress of the disease and the chang which would probably take place in the patient, and to check a excessive inflammation. Some of these witnesses also stated that their opinion, the plaintiff's hands and feet were not complete frozen, and might have been saved by careful and proper treatme others thought the amputation might have been made sooner than was. The defendant lived about nine miles from the plaintiff, a did not see him after the first visit on the 24th Dec., until the 6 Jan., though the plaintiff, who was suffering great pain, sent for hi frequently. The defendant visited the plaintiff again on the 18

king another surgeon with him. At that time the line tion had formed; the plaintiff's fingers were quite dead, pel bones exposed, and the fingers only hanging by the he defendant separated the tendons and removed the came to the conclusion that amputation should not take out ten days, in order to allow time for the granulations l make a flap to cover the end of the bone. He admitted iputation might have been made at that time, but stated ld not have been advisable, and that the plaintiff would covered any sooner if it had been done then, and that his laying it was to save as much of the plaintiff's hands as After the defendant's visit on the 18th January, the plained to suffer great pain, and being alarmed at the appearhands and feet, sent three times for the defendant, but ot attend, on the 28th of the month the plaintiff sent for rgeon, who amputated his hands between the knuckles ists, and his feet at the instep. The plaintiff had been s superintendent of a copper mine at Le Tete, at a salary annum and a house, rent free; but was entirely disabled of his hands and feet, from continuing in such employ-

ndant's counsel offered evidence of a statement by the o Gamble, at his first visit to the plaintiff, made in the mmediately after he had seen the plaintiff, that in his plaintiff would lose his hands and feet. This evidence d to by the plaintiff's counsel and rejected. The defendant ed evidence of one Milberry to shew that he had been n; who attended him; the length of time it took to heal; ent he received, and that he was cured; and that he was l once in three weeks. This evidence was rejected, as also e of the surgeon who attended Milberry on that occasion. as also rejected of the mode of treatment by the defendant ipbell in a case of freezing, to show that that it was simireatment of the plaintiff; that Campbell was not visited weeks, and that when the line of demarcation was formed, l amputation was performed. Evidence was also tendered e of the plaintiff's feet on examination by Dr. Rouse, one esses, in May or June previous to the trial. This being , and the defendant's counsel declining to state the purich he offered it, was rejected by the Judge.

t gave a verdict for the plaintiff for $25,000, stating, in certain questions left them by the Judge, that they found plaintiff would have lost a portion of his fingers under any but not to the extent to which he had suffered.

S. R. Thomson, Q. C., in Michaelmas Term last, obtained a ru *nisi* for a new trial, on the ground of the improper rejection of e dence, excessive damages and that the verdict was against the weig of evidence.

D. S. Kerr, Q. C., showed cause in Hilary Term. 1. The evider of Gamble was clearly inadmissable. When a man makes a sta ment to a patient acting under his advice, he cannot make evider for himself by turning round to a bystander, and making a contra statement. Where a declaration accompanies an act directly arisi out of, and following it, it is part of the *res gestæ*, but that is not t case with this declaration to Gamble. This was not a declarati arising out of an act; the defendant was not bound to give an opini as to plaintiff's chances of recovery to any one, much less to a thi party, who was an entire stranger. No case can be shown where party has been admitted to give testimony of what he said to a thi party, contradicting what he said to the party himself. The plaint was lulled into security by defendant's statement, that he would n lose any of his limbs, and thus prevented from calling in anoth physician, which he might have done, had the true state of the ca been revealed to him. The defendant cannot therefore be allow to give evidence, to impeach the credit of his own statements to t plaintiff. In any case the evidence is not material, for defenda has sworn that the plaintiff's case was incurable from the beginnir 2. The evidence of Milberry, as to the length of time it took to he him, when frozen, and that the interval between the visits in h case was three weeks, was properly rejected. No such eviden can be admissible; unless it can be shown that the cases exact resembled each other in every particular, the difference in the co stitution and strength of the patient, and in the extent of the injuri are barriers in the way of making such evidence admissible. T case of Milberry may not have resembled the present one, and it w one which the plaintiff not having heard of before, did not con prepared to meet with rebutting testimony. Besides it would be a defence in this case in answer to the allegation of negligence, for d fendant to testify that he had done his duty in another case. Ho comb *v.* Hewsen, (2 Camp. 391), is a case in point, and shows th such evidence would be foreign to the issue. 3. For the same reaso the evidence of Dr. Robert F. Thomson, in regard to the treatme of Milberry was properly excluded. 4. The evidence of Dr. Rou as to the state of the plaintiff's feet in May or June, and that amp tation had taken place too soon was properly rejected, for the d fendant's counsel refused to state the purpose for which the eviden was offered; there was no allegation against defendant that he h

amputated the plaintiff's feet prematurely, or unskilfully, that operation was performed by others. A mere statement that the evidence is tendered for the purpose of defence in the cause, is not sufficient, the counsel must state the particular purpose for which the evidence is offered, or the Judge may reject it. Seerey *v.* Brayley, (3 Allen). Rex. *v.* Grant, (3 Nev. & M. 109). The Judge has a right to know the purpose for which the evidence is tendered. 5. As to the point of excessive damages; the question of damages is peculiarly the province of the jury; and although the damages may be larger than the Court would have been willing to give, it should not set aside the verdict on that ground, unless the jury had been influenced by improper motives, or assessed them on a wrong principle. Here the damages are merely compensatory, the plaintiff a man who had been in receipt of a large income, has been rendered totally helpless by the negligence of the defendant, and the jury are justified in awarding large damages.

S. R. Thomson, Q. C., contra. 1. The evidence of Gamble, that defendant told him at the time of his first visit, that plaintiff must lose his hands and feet should have been admitted, for this was a statement made at a time when the defendant could have no motive in deceiving as to his prospects of recovering, except the merciful one of keeping up the patient's spirits, by holding out hopes of his not losing his limbs. The statement to Gamble cannot be separated from the other occurences of the visit, and should have been admitted. 2. The evidence of Milberry as to the treatment of his case for frost bite was clearly admissible: one of the gravest charges against the defendant, was that he neglected the plaintiff's case, by not visiting him ofen enough. Why should not the evidence of a man be received, who had been similarly frozen, and who had not been visited by his physician more frequently than the plaintiff was? 3. The evidence of Dr. Robert Thomson as to the treatment in Milberry's case, should have been admitted. The opinion of a physician in regard to a particular case, is made up of his experience in an aggregate of cases, and if he is not allowed to give the result of a number of cases, why should he not give evidence of a particular one? 4. The evidence of Dr. Rouse as to the state of the plaintiff's feet, was improperly rejected. Evidence of this sort on the face of it was clearly admissible, and therefore on what principle could it be contended that the counsel was bound to state more fully his reasons for offering it, than that it was for the purpose of defence in the cause. 5. The damages were enormous and excessive, and where the jury as in this case run riot, and seem to be governed by vindictive and improper feeelings, the Court will lay their hands on the verdict.

The rule laid down in Abell *v.* Light, (*Ante*, 250), is the correct one. Indeed it is impossible to understand on what prineiple the jury could have arrived at such a verdict; if they had given the defendant a sum sufficient to purchase a life annuity equal to his income, it might have been understood, but as it stands it is wholly incomprehensible. The amount of the verdict is so great, that it is calculated to shock the mind, and it clearly falls within the rule so well established, and so fully laid down in Abell *v.* Light.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

The plaintiff having been severely frozen in his hands and feet, employed the defendant as his physician and surgeon: the defendant undertook the case, but the plaintiff alleges that by reason of his negligence and inattention he suffered more inconvenience and pain than he would have done had his case been properly attended to by defendant, and that he ultimately lost by amputation a portion of his hands and feet, which might and would have been saved to him, had he received proper attention and treatment at the hands of defendant; but which he lost through defendant's negligence, and want of care and attention. A verdict was found for plaintiff for $25,000 damages. A rule *nisi* for a new trial was obtained on the grounds of improper rejection of evidence, excessive damages, and verdict against the weight of evidence. The rejection of evidence complained of was, 1st, refusing to allow Wm. Gamble to give evidence that the defendant at the time he was called in on his first visit, while in the house in which plaintiff was, stated to the witness that the plaintiff would lose his hands and feet. The defendant had given evidence that on this visit the defendant had stated to him that his case was not incurable, and that he would not lose his limbs. The natural effect of this testimony was to lead the jury's minds to the conclusion that in the defendant's opinion the injury, originally, was not of so serious a character as to jeopardize plaintiff's limbs, and that their loss was, therefore, not the natural result of the original injury, under judicious and proper treatment, but the effect of defendant's inattention. This was evidence unexplained, which we think might have been, and, we are informed by the learned Judge, was strongly pressed against the defendant. It launched the plaintiff's case from an important and favorable starting point. It was evidence of the opinion of the medical man, who first saw the case, and when there could have been no mismanagement, that there was nothing in the injury as then presented, from which loss of limb need be apprehended; and this opinion given by no other than the defendant himself. If this opinion —

was an honest and an accurate one, what difficulties were removed from the plaintiff's path? Practically, the burthen of shewing the case curable was removed, and the burthen of getting rid of his own opinion, and shewing the case incurable, was cast on the defendant; for if there was nothing in the injury, fairly treated, to lead to loss of limb—and out of the defendant's own mouth this is sought to be established—the inference must irresistably be, that the loss was occasioned by improper treatment or neglect. To rebut the effect of such hostile inferences the defendant shewed that it was his invariable practice with his patients, to take a hopeful and cheering view of their cases, for the purpose of keeping up their spirits; that in this case, the injury under which the plaintiff was suffering, produced a great shock on the nervous system, and that it was expedient and proper to prevent despondent and morbid feelings, and that though with a view of accomplishing this, he spoke encouragingly to the plaintiff, he immediately on leaving the room the plaintiff was in, informed Gamble (the man to whom the plaintiff first appealed for assistance), in answer to his (Gamble's) enquiry, as to his true opinion, that the plaintiff would lose his hands and feet. We cannot but look on this as one transaction; and if a portion of what the defendant said and did in his professional capacity, while at the house during the professional visit, is to be used against him, we think he should be allowed to shew all he said and did *bona fide*, on that occasion in his professional capacity; if a fair and just inference can only be drawn from the whole, which we think was unquestionably the case in this instance. All this, it must be remembered, took place before there could have been any negligence on the defendant's part, and when he could have no possible object in stating to Gamble other than the truth, though for the reason alleged, he may have thought it for the plaintiff's benefit to mislead him. 2nd. The rejection of the testimony of James Milberry; the evidence tendered was to show that the witness had been badly frozen; who attended him; the length of time it took to heal; the treatment he received; that it was successful, and that the visits were only once in three weeks. This was objected to, and rejected. The plaintiff's case against the defendant depended chiefly on his shewing the opinion of medical men, as to the proper treatment of frozen limbs, and their personal experience in particular cases. Why then should this testimony be excluded? the case against the defendant was, that his treatment of this case, particularly with respect to his attendance, was wrong. Was it not competent for him to rebut this, by showing actual cases of a similar character, treated with success in a similar manner? Such evidence would doubtless be open to the observation, that its weight was materially affected by the fact

of its not coming from a medical man, and it would doubtless be presented by the Judge to the jury, with observations calculated to lead them to consider it with caution. 3rd. Rejection of Dr. Thomson's evidence, as to how he treated Milberry. The defendant's counsel tendered evidence of the witness's treatment of Milberry for frost bite. The plaintiff's case was made out by the evidence of doctors, as to their experience in the treatment of injuries by freezing. Why should not the defendant, likewise a medical man, be allowed to tell his personal and practical experience? This only differs from the last objection, in the fact of the witness being the medical man, which renders its admissability less doubtful. 4th. The rejection of Dr. Rouse's testimony as to the state of the plaintiff's feet in May or June. The defendant's counsel offered on re-examination to show the state in which plaintiff's feet were in May and June last, after the defendant's attendance had ceased, and after amputation by Dr. Gove. On being requested by the Judge to state for what purpose the evidence was offered, he declined giving any other reason than, for the purpose of defence in the cause. Mr. Kerr objected, and the Judge rejected it, as the defendant's counsel declined to state the particular grounds on which the evidence was offered. It was quite within the discretion of the Judge, to require the counsel to state for what specific purpose the evidence was offered, to enable him to judge of its relevancy and admissability; and, on non-compliance, to reject the evidence. In Rex v. Grant (5 B. & Ald. 1085), Lord Denman says: "The Judge who tries a cause, ought to be informed of the purpose for which evidence is offered." 5th. Rejection of George Allen's testimony, as to the case of freezing of Campbell. The defendant's counsel tendered evidence to show how Campbell's case was treated; that the treatment was the same as adopted by the defendant in this, that he was not visited for several weeks; that the line of demarcation then formed, and amputation was successfully performed. This rests on the same principle as the rejection of Milbery's evidence.

As to the point of excessive damages, without desiring in the slightest degree to trench upon the peculiar province and right of the jury to estimate the amount of damages in a case of this kind, and reaffirming all we said at the last term on this subject in the case of Abell v. Light, we feel that this is a case which imperatively calls us to exercise the controlling power of the Court. We think that the evidence clearly shows, and the jury in fact found, that the injury the plaintiff sustained from the freezing of his hands and feet would, under the most careful treatment, have subjected him to a permanent loss of a portion of his limbs; though not, in the opinion of the jury, to the extent he suffered, from what they considered the

want of reasonable and proper care on the part of his medical attendant. In view of all the circumstances of the case we cannot avoid the conclusion that $25,000 was an excessive amount of damages; that the verdict, to use the language of Lord Mansfield in Gilbert *v.* Burtenshaw, (Cowper, 230), carried internal evidence of intemperance in the minds of the jury. Though by adopting this expression, we do not intend the slightest imputation on the honesty or the motives of the jury, we cannot escape the conclusion, that in assessing the damages, they were carried away by their feelings, rather than guided by their judgment; and as a consequence, they have named a sum, which we think, in the language of Lord Mansfield, "every one must acknowledge is too large." It has been urged by the plaintiff's counsel, that should the Court feel bound to set aside the verdict on the ground of excessive damages, they might, instead of simply ordering a new trial, give the plaintiff the option of reducing the verdict to an amount considered reasonable by the Court; and on his remitting the excess, refuse a new trial. We do not think, under the peculiar circumstances of this case, it would be right for the Court to substitute its opinion as to the exact quantam of damages, for that of the jury. Had the verdict been satisfastory in other respects, we should not have disturbed it on the last ground taken, viz: its being against the weight of evidence. We purposely refrain from discussing in detail the evidence in this case, as we do not wish to prejudice the case on another trial on either side, by any expression of opinion, beyond what is absolutely necessary to determine the question raised before us.

Rule absolute.

Ex parte CAMERON.

A contractor with the Commissioners of the Alms House for the County of York, is disqualified from being elected a City Councillor in Fredericton, under the Act 22 Vict. c. 8.

When a person elected a City Councillor, has entered upon, and is exercising the office, a *quo warranto* is the proper mode of trying his right to it.

A decision of the City Council in favor of the election, on the complaint of an elector, under the 24th Sect. of the Act, does not preclude the elector from applying for a *quo warranto* to try the right.

Gregory, in Hilary Term last, obtained a rule calling upon Henry Torrens, to show cause why an information in the nature of a *quo warranto* should not be exhibited against him, to show by what authority he exercised the office of City Councillor for the City of Fredericton, he being, at the time of his election, a contractor with

the Commissioners of the Alms House for the County of York, o of whom is appointed by the City Council, under the Act 22 Vi cap. 8. An application had been made to the City Council und the 24th Sect. of the Act, complaining of the return of the Counc lor, and they had decided in his favor. The material facts, and t Statutes bearing on this case, are fully set forth in the judgment the Court.

Fraser shewed cause in Easter Term, contending that *quo wa ranto* was not the proper mode of proceeding; that it should ha been by certiorari to remove the proceedings, or by mandamus the City Council to elect a Councillor. [ALLEN, J.: If they refus to hold an election, mandamus would be the remedy; but here t office is full *de facto*, and a *quo warranto* is the proper mode of tr ing the right of the Councillor.] The Act 22 Vict., cap. 8, § 2 pointed out a mode for trying disputed elections, and that was co clusive. Cameron, who made the objection was not a good relat because he took part in the election and may have voted for To rens. [RITCHIE, C. J.: It would be hard to infer that he did s He should have stated in his affidavit that he did not. The Ci Council had no control over the Commissioners of the Alms Hous and the fact of Torrens being a contractor with them did not di qualify him from holding a seat in the Council. His interest, if an was too remote. A disqualifying Act should be strictly construed.

Gregory, contra. The 8th section of the Act declared that a Ci Councillor should not, "directly or indirectly," have a share or inte est in any contract, with or in behalf of the city. A contract wi commissioners, one of whom was appointed by the Council, was ce tainly an interest sufficient to come within this section, because t Councillor would have a voice in the appointment or displaceme of the Commissioner. [ALLEN, J.: It may not come within t words, but it is within the spirit of the Act.]

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

This was a rule calling upon Henry Torrens, to show cause w an information in the nature of a *quo warranto* should not be e hibited against him, to show by what authority he exercised t office of City Councillor of Fredericton. The application was ma under the Act 22 Vict., c. 8, the 8th section of which declares th "no person shall be qualified to be elected or to serve in the office "Mayor or Councillor, so long as he shall hold any office or place "profit in the gift or disposal of the City Council, nor during su "term as he shall by himself or his partners, or in any other mann

"directly or indirectly, have any share or interest in any contract or "employment, with, or on behalf of, the City Council." The disqualification alleged against Torrens is, that he is a contractor with the Commissioners of the Alms House for the County of York, one of whom is appointed by the City Council of Fredericton, under the 45th section of the above Act. By this section, the City Council is authorized to displace any officers appointed under the Act, and appoint others in their stead; to grant compensation to such officers for their services; to define their duties and respective terms of office, which, except in the cases of the City Clerk and Treasurer, shall not be longer than one year, unless they are reappointed; and to impose penalties for non-performance of duties. By section 53, all officers appointed by the City Council, and entrusted with the collection or expenditure of any moneys belonging to the corporation, shall be accountable therefor to the City Council, in such manner as may be directed by the by-laws and ordinances of the City Council. The intention of the Legislature, by the 8th section of this Act, was to exclude from the City Council any person who might be directly or indirectly interested in any matter which the Council had to decide, and to prevent the members of the Council from being influenced in their votes by their personal interests; because no man should take part in the decision of a matter in which he has an interest. The proceedings of all tribunals should be such as to avoid the appearance of doing what is wrong; and as said by Coleridge, J., in Reg *v.* the Justices of Surrey (33 Eng. R. 112), to remove even from suspicious minds a belief that the decision proceeded from interested motives.

By the Act 3 Geo. 4, cap. 25 (Local Stat. 212), which authorized the establishment of the Alms House in the County of York, the Commissioners of the Alms House were required to account annually to the Justices in Sessions, for the money expended in the support of the poor. After the incorporation of Fredericton, the appointment of a Commissioner of the Alms House for Fredericton was vested in the City Council; and the Commissioner so appointed, together with the Commissioners appointed in the other parishes of the County, have the management of the Alms House, and the right to make contracts in connection therewith, and he is accountable, not to the Justices, but to the City Council, under the 53rd section of the Act, being an officer appointed by the City Council, and "*entrusted with the expenditure*" of the money assessed and collected by the corporation for the support of the poor of the city.

It was argued in showing cause against this rule, that as Torrens' contract was made with the Commissioners of the Alms House, he did not come within the prohibition of the 8th section of the Act,

which ought to be construed strictly. But we think it clearly was a contract "*on behalf* of the City Council," their Commissioner being one of the contracting parties, and a considerable portion of the money which Torrens would receive under the contract, being necessarily money belonging to the corporation, and with the expenditure of which the Commissioner appointed by the City Council was entrusted. We also think the Act should have a fair and reasonable construction, in order to carry out the intention of the Legislature. It is easy to imagine how great frauds might be committed upon the public in a case of this kind. Suppose that by a combination between the commissioner and the contractor, a contract was entered into very detrimental to the public interests, and giving the contractor undue advantages, would it be right or honest that when the accounts of the Commissioner involving the payment of money under that contract, were brought before the City Council, the contractor himself should sit at the Council Board and vote upon them? Or would it be proper that a contractor with the commissioner, and who perhaps had failed to perform his contract, and might be asking favor at their hands, should vote upon the amount of compensation to be given to a commissioner for his services? And to put another case —suppose a motion made before the City Council to displace the commissioner for alleged improper conduct in entering into or carrying out a contract, would it not be contrary to every principle of justice that the contractor should vote upon that question? And yet either or all of these cases might occur, if the contractor, in the present instance, was not held to be a disqualification.

In making these observations, we do not intend to impute any misconduct either to Torrens or the Commissioner; and the affidavits do not charge anything of the kind. Our remarks are only intended to illustrate the principle, and to show the reasons which govern us in construing the Act as disqualifying a person concerned in such a contract from being elected to the City Council—a construction which, we think, admits of no doubt. But if it was doubtful, we think the rule ought to be made absolute, because it is said in 7 Com. Dig. 199, that the Court will not decide the validity of the election of a corporator on a rule to shew cause, if the question be new or doubtful—citing Rex *v.* Godwin, (Doug. 397). An objection was made that the application must fail, because Cameron had concurred in the election of Torrens; and Rex *v.* Simmons, (4 T. R. 223), Re *v.* Treveneu, (2 B. & A. 339), were cited on this point. The affidavits, however, do not support the objection. There was not only no acquiescence in the election of Torrens, but an actual protest against his right to be elected. For these reasons, we think the rule must be made absolute.

BALDWIN *v.* HITCHCOCK, impleaded with Howard.

A promissory note drawn in Boston, where both the maker and payee resided, was made payable "at any bank." Held, That this meant any bank in Boston.

One of the signatures to a joint note was "Francis Howard," an action was brought against the other maker of the note, and Francis Howard, who was so named in the declaration: Howard was not served with process. At the trial, the plaintiff to prove the making of the note, gave evidence of the handwriting of a man named Francis Howard: and the defendant endeavored to show by cross-examination that the other maker of the note was a female. Held, That as the declaration stated the name to be "Francis," and the defendant knew before the trial who the other maker of the note was, he was not entitled to a new trial on the ground of surprise.

This was an action on a promissory note in the following words:—

"BOSTON, March 1st, 1867.

"Four months after date we promise to pay to the order of John Sears, or bearer, "one thousand dollars, value received, payable at any bank, with interest."

L. A. HITCHCOCK,
FRANCIS HOWARD.

This note was endorsed—

"I order Mr. Thomas D. Baldwin to collect this note.
"Boston, July 15th, 1867." JOHN SEARS.

At the trial before ALLEN, J., at the last York Sittings, the plaintiff proved presentment of the note for payment at a bank in St. John. The makers and payee of the note all reside in Boston. The defendant's counsel moved for a nonsuit on the ground that presentment should have been made at a bank in Boston. The learned Judge was of that opinion, but reserved the point, with leave to move to enter a nonsuit, and directed a verdict for the plaintiff for $742, being the amount in the currency of this Province, which would produce $1,000 and interest in Boston, with leave to the plaintiff's counsel to move to increase the verdict to $1,000 and interest.

In Easter Term last *Fraser* obtained a rule *nisi* for a nonsuit on the point reserved. He also proposed to read an affidavit of the defendant Hitchcock, stating that the other party whose signature appeared on the note, was not the person against whom the action had been brought, but a female named Frances Howard, and that he had seen her sign the note. [ALLEN, J.: Was it not your duty to give that evidence at the trial? RITCHIE, C. J.: The declaration contained the name of Francis Howard, and you should have come prepared to defend if the person sued was not the maker of the note. We cannot grant you a rule on this ground.)

Needham now shewed cause. I contend that the words "any bank" mean any bank in the world. There is no case to show that it confines the presentment to the place where the note was made.

If it had said any Bank in the city of Boston, it would have be different. [RITCHIE, C. J.: Must we not put a reasonable constru tion on the words. According to your argument, it might have be presented at Calcutta; do you contend that that would have be sufficient?] If the note had been made payable at five banks, t plaintiff would have had his election as to the one he would prese it at, and the words "any bank" should at least cover as much grou

Fraser, contra was not called on.

RITCHIE, C. J.—The words "any bank" must here be taken mean any bank in the place where the note was made; for it wou be absurd to suppose that the makers are required to keep funds i the payment of the note in banks all over the world.

Per Curiam, Rule absolute for a nonsuit.

SMITH *v.* THE QUEEN INSURANCE COMPANY.

A condition of a policy of insurance on clothing, provisions, &c., in St. John, requi that persons sustaining loss, should forthwith give notice thereof to the compa and within fourteen days thereafter deliver in as particular an account of the as the nature and circumstances of the case will admit of, and make proof of same, &c., and if there appeared any fraud or false statement, or that the fire h pened by the wilful means, or connivance of the insured, he should be exclu from all benefit under the policy. The plaintiff's affidavit furnished to the comp under this condition, claiming a loss of furs, clothing, and bedding, by fire, st that he was in the County of Sunbury at the time of the fire and was unabl ascertain in what manner it originated. In his evidence on the trial, the plai swore that he left St. John about 7 o'clock, p. m., on his way to the Count Sunbury, where he arrived the following morning; the fire broke out at 9 o'cl at which time the plaintiff would have been in the County of Kings, on his wa Sunbury, and only a few miles from St. John. The house was locked when the was discovered, and, on being broken open, it was found to be in a room in wh there was neither fire-place nor stove, and no appearance of any clothing or bedd a candle-stick was found in a barrel in this room, containing straw partly consun Held, That it was the duty of the plaintiff to state in his affidavit, that the h was locked at the time of the fire, the circumstances connected with his leav and where he was at the time, and that his statement that he was in the Count Sunbury, was a false statement and avoided the policy.

Held, also, that an account of the loss delivered within fourteen days after knowle thereof by the assured was in time, though more than fourteen days had elap since the fire.

This was an action on a policy of insurance to recover the snm $160, insured by the defendants on certain articles of household f niture, wearing apparel, &c., belonging to the plaintiff which alleged to have been destroyed by fire. The case was tried by W don, J., at the St. John Circuit in January last, and a verdict fou for the plaintiff. The material facts are fully detailed in the ju ment of the Court.

S. R. Thomson, Q. C., in Hilary Term last, obtained a rule *nisi* for a nonsuit on the grounds. 1st. That there was false swearing in the preliminary proof. 2nd. That the preliminary proof was not furnished within fourteen days after the fire; or, for a new trial on the ground of misdirection, and that the verdict was against evidence. Thurtell *v.* Beaumont (1 Bing. 339) was cited.

King shewed cause in Easter Term.

The meaning of the term "false statement" in the condition of the policy means a false statement with intent to defraud, and the jury have negatived fraud; 2 Parsons on contracts, 462, Woodinger *v.* Mechanics' Ins. Co. (2 Hall, N. Y. Reports.) [RITCHIE, C. J.: The statement was certainly calculated to mislead the defendants.] Under the conditions in the policy, defendants were not entitled to a statement of the cause of the fire, or of the personal connection of the assured with it, or of his whereabouts, and any erroneous statement of the same is only evidence of fraud for the jury; such statement being dehors the condition and an immaterial fact quoad the preliminary proof, Angel on Ins. 298, 2 Parsons on contracts, 461. It was decided by the Supreme Court of the U. S. in Catlin *v.* Springfield Fire Ins. Co. (1 Sumner 436), that "the particular account of loss and damage" required by a condition of the policy, referred to the articles lost and damaged, and not to the manner or cause of the loss. Conditions in a policy are to be construed strictly against the insurer, when they impose burthens on the assured. Gilbert *v.* North Am. Ins. Co. (23 Wendell 43). The insurer might have drawn the condition more specific in its terms as in Ketchum *v.* Protection Ins. Co., 1 Allen, 136. The words "within fourteen days thereafter," mean after knowledge of the loss, and not the time of the fire. That is the grammatical construction of the words. Com. Dig. "Parols" (A. 14); Roper *v.* Lendon (1 E. & E. 825). The latter part of the condition, that if no claim is made within three months after the occurrence of the fire, the insured shall be barred of any right under the policy, shows this is the true construction.

S. R. Thomson, Q. C. contra. I admit that the word "thereafter" in the condition applies to the last antecedent, the notice, and not to the fire. [The Court said they considered that was the correct construction]. The notice was not given in time. The plaintiff had no right to leave his property without any person to look after it, and notify the company in case of loss. The statement of the plaintiff that he was in Sunbury when the fire took place, was clearly a fraud upon the defendants, for it prevented them from making inquiries in regard to the circumstances under which the fire took place. If

he had told what afterwards came out at the trial, that he was travelling in the stage and only a short distance from the scene of the fire when it occurred, it would have at once put the defendants on the alert, the stage driver could have been brought as a witness, and it might possibly have been shown, that on the night of the fire the plaintiff never left the city at all. It was a clear misdirection on the part of the learned Judge to leave to the jury whether this was a fraud or not, he should have directed them that it was false swearing, and that it vitiated the policy.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

This was an action to recover for a loss by fire, under a policy issued by the defendants to the plaintiff on household goods, wearing apparel, china, bedding, &c. The policy contained the following condition:—"Statement of Claim"—"persons insured, sustaining any "loss or damage by fire, are forthwith to give notice thereof to the "company or the agent through whom the policy was effected, and "within fourteen days thereafter, deliver in as particular an account "of their loss or damage as the nature and circumstances of the case "will admit of, and make proof of the same by declaration or affir-"mation, and by their books of account or such other reasonable "evidence as the company may require, and until such evidence is "produced, the amount of such loss or any part thereof, shall not be "payable or recoverable; and if there appear any fraud or false state-"ment, or that the fire shall have happened by the procurement, wil-"ful act or means, or connivance of the insured or claimant, he, she, "or they shall be excluded from all benefit under the policy."

On the 7th December, a fire was discovered on the plaintiff's premises about 9 o'clock in the evening. The plaintiff occupied part only of the house, in which the articles insured were described to be. At the time of the alarm, the plaintiff's portion of the house was locked; the door was broken in, and the fire extinguished before it had injured more than one of the rooms occupied by the plaintiff; a store-room in which there was neither a fire-place nor a stove; the articles found in it being provisions and crockery. In this room, and forming part of the *debris* of the fire, were the remains of a barrel almost entirely consumed, in which were a candlestick, and some straw partly consumed. To quote the language of one of the witnesses who first entered the house. "I got in, and put the fire out "as quick as possible. The fire originated in the centre room—none "in the kitchen or parlor. I found part of a barrel of flour, and a "barrel of straw; a candlestick in the bottom of the barrel of straw. "I saw no clothes hanging up, nor any silk dresses—no appearance

"of any thing being consumed. I could see nothing but bare walls—"no fire in the end rooms; the fire was confined to the two rooms in "the centre. I could find no remains of furs, clothing or silks."

The plaintiff stated, that on the evening of the fire, he left about seven o'clock, took the stage at the post office, and got to Geary in Sunbury County about daylight the next morning, the distance from St. John being about forty-seven miles; that he arrived at Belyea's in King's County, about eighteen miles from St. John, about ten o'clock.

On the 27th December the plaintiff gave the agent of the company a statement of his claim in the followine words;—

"ST. JOHN, December 27th, 1866.

"*To the Directors of the Queen Insurance Company.*

"Gentlemen,—The undersigned, Orran Smith, being the assured under Policy No. 128797 of your company, hereby gives notice of claim for loss, and also states the following circumstances connected therewith, viz:—

I. That at or about the hour of ten in the evening on the 7th day of December, 1866, as he is informed, he being at the time in Sunbury County, a fire occurred at a two and a half story framed building, situate on the east side of Portland Street, Parish of Portland, Saint John County, N. B., being the premises covered by the said policy.

II. That he was at the time of said fire in Sunbury County, and that he is unable to ascertain in what manner the fire originated.

III. That the following is a correct statement of the Insurances existing on the day of the fire upon the property destroyed or damaged, viz: £40 in the Queen Insurance Company, by Policy No. 128797.

IV. That the articles enumerated in the annexed list, being his property insured under said policies, were destroyed or damaged by said fire: that prior thereto they were respectively of the values stated under the head "Value of Property"; and that in consideration of such damage, claim is hereby made for the sums stated in said list, under the head "Claim for Damage sustained."

(Signed) ORRAN SMITH.

	Value of Property.	Claimed for Damage sustained.
Printing Material,	$35.00	$34.00
Dishes,	15.00	7.50
One set Furs,	20.00	20.00
Two Silk Dresses,	24.00	24.00
Four Stuff Dresses,	16.00	16.00
Two Tweed Dresses,	10.00	10.00
Underclothing,	20.00	20.00
Three Bonnets,	9.00	9.00
Bedding,	36.00	36.00
One Black Suit,	24.00	24.00
One Tweed Suit,	21.00	21.00
Provisions,	30.00	24.00
	$260.00	$245.50

Claim for damage sustained $160.

Annexed to this statement was an affidavit as follows:

"Orran Smith, of the Parish of Portland in the City and County of St. John, Tra maketh oath and saith, that the statements contained in the annexed account in wri of the loss or damage sustained by this deponent, in respect of certain property ins by Policy No. 128797 of Foreign Fire Policies issued by the Queen Insurance Comp are correct; and this deponent further saith, that by reason of his absence from said County as therein referred to, this deponent did not hear of the said fire until morning; and that this deponent forthwith gave notice to C. E. L. Jarvis, agei St. John of the said company, of such his loss and damage."

"Sworn to, &c." ORRAN SMIT

It is not denied that the statement of his being in Sunbury at time of the fire, as put forward in these documents, was at varia with the fact, and therefore there was not a literal, nor, as we thi a substantial compliance with the condition of the policy, by furn ing as "particular an account of the loss or damage, as the nat and circumstances of the case would admit of," and without any f statement. Under the facts detailed in evidence, the defenda were, in our opinion, entitled to a strictly accurate account of plaintiff's personal connection with the premises, and his act whereabouts at the time of the fire; and which, had they been forward, were, in our opinion, in connection with the state in wh the premises were found at the time of the fire, calculated to cre strong suspicions, and would, without doubt, have caused the c pany immediately to institute a searching investigation; wher the statement made tended to disarm suspicion, and so stifle enqu by showing the assured far away from the premises, and raising inference that he was not, and had not been, within any reasona time, near the premises, and therefore could know nothing about cause of the fire, or have been in any way connected with it. G faith, and the true spirit and intention of the contract, we thi required the assured to disclose the circumstance of the prope being locked up by him, and his leavtng the city, but at mos couple of hours before the fire was discovered, and which must h broken out and been discovered before he could have been more t a few miles on his journey, and several hours before he could po bly have been in the County of Sunbury. If he said any thin all about his position at the time of the fire, he ought to have sta the facts clearly, unequivocally, and truly. This he certainly not do, and therefore, there being a false statement, and a nonc pliance with the condition of the policy, he has by the express te thereof excluded himself from all benefit thereunder.

Rule absolute for entering a nonsui

TOMKINS *v.* TIBBITS.

A. agreed in writing to cut 100 m. feet of logs on land of which he had the permit, and deliver them to the plaintiff in the following spring; the logs to be the property of the plaintiff; and that plaintiff might at any time take possession of the logs and sell them, and after deducting from the price the amount of his supplies, and all expenses he might be put to with them, to pay the balance, if any, to A. Held, That without a delivery, or some act done by the plaintiff under the agreement, he had no property in the logs cut thereunder by A.

A. cut considerably more than 100 m. feet of logs on the land mentioned in the agreement, of which he delivered the plaintiff 94 m. feet and sold the remainder to the defendant; the plaintiff claimed the whole of the logs, under a verbal agreement and delivery alleged to have been made after the written agreement, and replevied the logs sold to the defendant (53 m. feet); the jury found against the plaintiff's claim under the verbal agreement, and gave a verdict for the defendant—the Court refused a new trial, though the plaintiff had not received the whole quantity agreed to be delivered to him—this difference being very small.

Where a witness on cross-examination denied having signed a paper, but which was not then shewn to him, and the opposite party afterwards produced the paper, and gave evidence to prove the witness' signature to it, the witness may be recalled to disprove the signature.

Replevin for 55,000 feet of spruce logs. Pleas:—1. *Non cepit.* 2. Property in the defendant. 3. Property in Isaiah B. Rideout. Tried before Allen, J., at the York sittings in June last.

The plaintiff had made a written agreement with one Nathaniel Rideout in December, 1865, by which Rideout agreed to go upon land on the Muniac, of which he had a permit, and cut, haul, and raft 100,000 feet of merchantable spruce logs, to average six to a thousand, and deliver them at Spring Hill in June then next, for the said Tomkins, marked "R," for $5 per thousand; the said logs to be the property of the said Tompkins; and that the said Tompkins by himself, his clerk or agent, at any time he should think proper, might take possession of the said logs, take them to any place he saw fit and sell them, and after deducting the amount of supplies already advanced, or thereafter to be advanced, from the price of the logs, and all expenses that he (Tompkins) might be put to, in case he had to haul them, to pay the balance, if any, to said Nathaniel Rideout. Rideout went on the land mentioned in the agreement, and cut considerably more than 100,000 feet of logs, and delivered 94,000 feet to the plaintiff at Spring Hill in May and June, 1866. The plaintiff supplied Rideout to the amount of about $300 beyond the value of the 100,000 feet of logs, and claimed to have had a delivery from him of the whole of the logs at the Muniac, about the 7th May, before they were rafted, under a verbal agreement made in February previous, by which he stated, that in consideration of his agreeing to make further advances to Rideout to enable him to go on, Rideout agreed to deliver to him all the logs

he should get out that winter. Rideout denied making a agreement, or making any delivery of logs to the plaintiff the 94,000 feet. He also denied, on cross-examination, the 7th May he had examined the plaintiff's account against hi ing a considerable balance due the plaintiff, and had signed l to the account in the plaintiff's ledger. The defendant cla logs in dispute under a purchase from Isaiah B. Rideout, a of Nathaniel Rideout, and one of the principal questions at was, whether there was any *bona fide* transfer from Natl Isaiah B. Rideout, or whether it was collusive, and for the of defrauding the plaintiff of the amount due him. Nathan out swore that he sold and delivered the logs to his brother sideration of his agreeing to pay the wages of the men been hired to get the logs, and also to pay certain debts d him (Nathaniel) and for which his brother was also liable rity. Nathaniel Rideout left the Province immediately a delivery of the logs to his brother. The evidence was very ing on many points—particularly in respect to the alleged ag between the plaintiff and Nathaniel Rideout in February, delivery of the logs under it in May, 1866, and also as to th ment of the account by Rideout in the plaintiff's ledger. T containing the account was produced, and both the plaintiff clerk swore that Rideout signed it in their presence. Ride called, subject to objection, to rebut this evidence, and der the signature to the account was in his hand writing. The Judge directed the jury that the written agreement gave tl tiff no property in the logs without a delivery, or unless possession of them under the authority contained in it. Tha a right to take possession of all the logs cut by Rideout if m 100,000 feet, and keep them a sufficient time to enable him the quantity and quality he was entitled to under the ag but if no act of that sort was done, the legal property rem Rideout, as the logs were cut by him on his own land, and dispose of them. That the plaintiff's right to recover d principally upon the alleged agreement of February, and the on the 7th May; that if such agreement and delivery we the plaintiff was entitled to a verdict, because after such Rideout would have no property in the logs to transfer to his under whom the defendant claimed. That to enable the d to recover, they must be satisfied that there was a *bona fide* delivery from Nathaniel Rideout to Isaiah B. Rideout.

Verdict for the defendant on the 1st and 2nd pleas.

S. R. Thomson, Q. C., in Michaelmas Term last, moved f

trial on the grounds—1st, misdirection: 2nd, that the verdict was against evidence; 3rd, the improper admission of Rideout's evidence to contradict the plaintiff and his clerk, as to his signature in the ledger; he having previously sworn on cross-examination that he did not sign it, his evidence on that point was exhausted. [RITCHIE, C. J.: Who exhausted him? The defendant did not. WILMOT, J.: I think his evidhnce was properly received: he had a right to see his alleged signature. ALLEN, J.: When he denied on cross-examination that he had signed the account in the plaintiff's book, the account was not shewn to him, and when you afterwards, in your case, produced the book and gave evidence that he had signed it, I thought the defendant had a right to recall Rideout to rebut it. RITCHIE, C. J.: There is no doubt about it.]

Rule *nisi* on the first and second grounds.

Needham shewed cause in Easter Term.

The direction of the learned Judge was right. The agreement cannot be construed in any other way than that the logs were not to be plaintiff's property, without a delivery. The plaintiff has received already 94,000 feet of logs, and if he has any remedy for the remaining 6,000 under the agreement, it is against Rideout he should proceed and not against the defendant. The agreement gave him the right of selecting 100,000 feet of the logs got out by Rideoot, but not the absolute ownership of any of them until he had made his selection, and taken possession of them. Whether Rideout did or did not sign the account, cannot affect the case.

S. R. Thomson, Q. C., contra. The true construction of the agreement is, that the logs cut by Rideout during the winter under that permit were to belong to plaintiff; so that he might select 100,000 from them. All the logs vested in him subject to be devested when the selection was made; otherwise the words, that the logs were to be the property of plaintiff, have no meaning. Until the 100,000 had been set apart for plaintiff, he had a primary lien on all the logs, and Rideout could not sell. The agreement gives the property in the logs to the plaintiff, outside and independently of the delivery, and he became a trustee for Rideout for any balance that might remain after paying the account. Under any circumstances, there was a short delivery of 6,000 feet, which the plaintiff would have a right to recover. If Rideout signed the account (and the evidence of it is almost conclusive) the verdict cannot stand, because it is sustained by the evidence of a man who is guilty of perjury.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

This was an action of replevin for a quantity of spruce lo taining about 53,000 sup. feet. The plaintiff had entered written agreement with one Nath. Rideout on the 5th De 1865, whereby Rideout agreed to go on land of which he ha mit, situated on the Muniac, and to cut, haul and raft 100,0 feet of good merchantable spruce logs, to average six to a th and to deliver them at Spring Hill on the 9th of June the marked R, for the sum of $5 per thousand, for the said Ton the said spruce logs to be the property of the said Tompki Tompkins by himself, his clerk or agent, at any time he migh proper, might take possession of the said logs and take them place he saw fit, and after deducting the amount of supplies advanced, or thereafter to be advanced, from the amount or the logs, and all expenses he might be put to in case he had the same, should pay the balance, if any, to said Nathaniel I After making this agreement, Rideout got out a quantity considerably over 100,000, the supplies for which were obtain the plaintiff, and in February 1866, the amount of his accou the plaintiff was considerably more than the value of the feet of logs. The case set up by the plaintiff was, that in co tion of his then undertaking to make further advances, Ride agreed to deliver to him all the logs which he should get out that winter, and that in May following, while the logs wer Muniac, he had delivered them and the plaintiff had taken sion and put his mark upon them. The defendant purch logs in dispute from Isaiah B. Rideout, who claimed them by p and delivery from Nathaniel Rideout in the heginning of Ju Previous to this, Nathaniel Rideout had delivered to the pla Spring Hill, 94,000 feet of the logs. Nathaniel Rideout po denied making any agreement with the plaintiff in Febr deliver to him the whole of the logs, and making any deli him in May. He stated that he had sold and delivered the Isaiah B. Rideout, who undertook to pay some of his hired m who was also liable as security for him on notes to a consi amount. The evidence on both sides was very contradicto the transfer and delivery of the logs to Isaiah B. Rideout was to have been collusive and without consideration, for the pu defrauding the plaintiff. The learned Judge directed the ju the agreement of the 5th December did not give the plain property in the logs without a delivery, or until he took po under the authority contained in it, and that until he did so, had authority to sell the logs. He left to the jury the q whether Rideout had agreed to deliver all his logs to the in February, and whether he had delivered them, directing

that case to find for the plaintiff; and also whether there had been any *bona fide* sale and delivering to I. B. Rideout, in which case they were to find for the defendant. The jury found a verdict forthe defendant.

A new trial was moved for on the ground of misdirection in the construction of the agreement. We think, however, that the construction put upon it was correct. The logs were the property of Rideout, cut upon his land, and without a delivery to, or some act done by Tompkins under the agreement, no property vested in him. The authority given him to take possession of the logs, sell them, and account to Rideout for the proceeds, is inconsistent with their being Tompkins' property, as they were cut, whatever equitable right he might have had in them. The clause, stating that they were to be his property, relates to the 100,000 feet which Rideout was to deliver, and not to the whole quantity cut.

It was contended that the plaintiff was, at all events, entitled to recover for 6,000 feet of the logs, which it was admitted Rideout had not delivered under the agreement. But the claim set up by the plaintiff was to the whole of the logs cut by Rideout, under the alleged agreement of February, 1866, and when he replevied them from the defendant, he claimed and took the whole of them, and not merely the balance of 6,000 feet short delivered under the agreement of the 5th December. The main question in dispute was, whether the plaintiff was entitled to the logs under the alleged agreement and delivery of February and May, 1866, and the jury having found against him on this point, and we being of opinion that the agreement of the 5th December, 1865, did not vest the property in him, we do not think this case should be sent to a new trial to enable the plaintiff to recover the small quantity of 6,000 feet of logs, though his claiming the whole of the lumber under a different agreement, which was not proved, might not deprive him of what he was really entitled to. Had he claimed only the balance of 6,000 feet from the defendant, it is quite possible that no difficulty would have arisen, or at all events, such a claim could not very well have been disputed by the defendant. As to the verdict being against evidence —though there were great contradictions on both sides, and particularly in the testimony of Nathaniel Rideout as to the signatures in the plaintiff's book, all these questions were left to the jury who are the proper judges of the credibility of the witnesses, and we cannot undertake to say that they have come to a wrong conclusion. Even if we should think that the evidence so preponderated in favor of the plaintiff, as to entitle him to a new trial, it could only be granted on payment of costs, which, where the amount in dispute is so small, would be no advantage to him. The rule for a new trial will therefore be discharged. Rule discharged.

McELVENEY *v.* McKILLIGAN.

Where a written lease of a farm excepted a part of it, described as Lot No. 2 evidence is inadmissible to shew that it was agreed between the parties at th of the bargain, that the tenant should also occupy Lot No. 2.

Fraser obtained a rule nisi to set aside the verdict in this ca the ground of the improper admission of parol evidence to co a written agreement.

Needham shewed cause on a former day in this term, and *F* was heard in support of the rule. The facts will sufficiently a in the judgment of the Court, which was now delivered by

ALLEN, J. The question in this case is, whether evidence statement made by George Jacob, under whose direction the de ant distrained for rent, was improperly received, as contrad the terms of the written lease. The plaintiff had leased a farm Jacob under a written agreement in the following words:—"I h "agree to lease my farm, known as the Hampton Grange Farm "and except so much of it as is contained in Lot No. 2, on the "side of the Royal Road, and the piece of land fronting Wi "Eakins' on the west side), to McElveney, for the term of ten y &c. The plaintiff's counsel gave evidence to show a verbal a ment between the parties that the plaintiff was also to occupy Lo 2; and called a witness who stated that the agreement was ma his house, and that both before and after the agreement was si Jacob stated that the plaintiff was to have Lot No. 2, till he (J built a cottage on it.

In the recent cases where the question as to parol evidence to a writing has been raised, and the evidence has been received, i on the ground of their being exceptions to the general rule. in Seago *v.* Dean (4 Bing. 459) where a parol agreement by the lord to allow the tenant a certain sum for repairs—the written stating nothing about it—was held to be an independent agree In Wallis *v.* Littel (11 Com. B. N. S. 369, 8 Jur., N. S. 745), i held that parol evidence was admissible, to shew that a wr agreement to assign a lease was to be void if the landlord di consent to the assignment; because it neither varied nor contrad the writing, but merely suspended its operation. In Lindley *v.* I (17 Com. B., N. S. 578, 10 Jur., N. S. 1103), the parol agree was held to be collateral to, and distinct from the written agree and inconsistent with it. In Malpas *v.* the London and Soutl tern Railway Company (Law R., 1 C. P., 336), where the pla had agreed with the defendant to convey cattle for him to K st and at the same time, without noticing its contents, signed a

signment note by which the cattle were to be taken to E, an intermediate station on the line to K, it was held that parol evidence was admissible to shew that the defendant had agreed to carry the cattle to K, as it did not contradict, but only supplemented the written contract. Albert *v.* the Grosvenor Investment Company (Law R., 3 Q. B., 123) may also be referred to. Unless the present case can be brought within some of these exceptions, it is clear that the parol evidence was improperly admitted. Had the written lease made no mention of Lot No. 2, the parol agreement would have been collateral to, and not inconsistent with it; but here the writing and the parol agreement are directly at variance—the one expressly excepting Lot No. 2, the other allowing the occupation of it. On this ground, therefore, we think there should be a new trial. This renders it unnecessary to consider the other objection, that the verdict is against evidence.

Rule absolute.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NEW BRUNSWICK,

IN MICHAELMAS TERM.

IN THE THIRTY-SECOND YEAR OF THE REIGN OF QUEEN VICTORIA.

McMILLAN *v.* FAIRLY and others.

Trespass against several, two of the defendants left after being forbidden by the plaintiff, and did not again enter on the land, or take part in the subsequent trespass; the plaintiff's counsel elected to go against all the defendants for the trespasses proved. Held, That the damages were properly confined to the trespasses committed before the two defendants left the land.

Trespass *quære clausum fregit.* Plea—not guilty. At the trial before ALLEN, J., at the last Northumberland Circuit, it appeared that the action was brought for an injury to the plaintiff's intervale on the river Miramichi, by hauling logs off it which had been floated there by the spring freshet. The plaintiff had forbidden the defendants from going on his land; and after they had been hauling logs part of a day in the beginning of July, he again forbade them hauling any more till after the grass was cut, threatening to proceed against them as trespassers if they did so. Two of the defendants Hunter and Pond—who were hired servants of Fairley, one of the owners of the logs, left the land upon this notice, and interfered no further while the logs were being hauled off the plaintiff's land, but the other defendants continued hauling till all the logs were removed. Up to the time that Hunter and Pond left, there was very little injury to the grass or land—the greatest damage being done by the other defendants afterwards. The defendants did not deny the trespass, but endeavored to shew that the damage was trifling, and

might have been recovered in a Justice's Court. The evider this point, both as to the quantity and value of the grass dest and the injury to the land, was very conflicting. At the close evidence, the plaintiff's counsel elected to proceed against a defendants. The learned Judge thereupon directed the jury the plaintiff could only recover damages for the acts of tresp which all the defendants were concerned, and not for any d done after Hunter and Pond left. That in estimating the da they might take into consideration the fact that the trespa committed after notice not to go on the plaintiff's land; tha were not confined to the actual damage done to the land, thou the injury was so trifling that the plaintiff might have recove a Justice'a Court, he thought it was not a case in which they called on to give damages beyond the injury actually sust Verdict for the plaintiff—damages $2.

Wetmore, Attorney General, on a former day in this term, r on behalf of the plaintiff to set aside the verdict on the grou misdirection. He contended, that all the defendants having g the land with a common purpose, the mere fact of two of them wards going away did not relieve them of responsibility. Fer v. Savoy, (4 Allen 263), was in point; it was there held the common purpose created a common liability. The fact of thes defendants not being owners of the lumber did not affect liability, for they might have been hired by the job, and migh have had an interest in getting the lumber down. The da were too small.

Cur. adv. v

ALLEN, J., now delivered the judgment of the Court.

The plaintiff having elected to proceed against all the defen we think the learned Judge was right in confining the jury damages, arising from the acts proved to have been committed the time the plaintiff forbade the defendants trespassing, and which two of the defendants, Hunter and Pond, desisted fron furthea acts of trespass. There was evidence that the tresp to that time was trifling, the principal acts of trespass having committed afterwards by the other defendants, We can di no evidence which, in our opinion, would have warranted the le Judge in leaving to the jury, or which would have justified th finding that all the defendants, including Hunter and Pond, liable for such subsequent acts of trespass, and therefore we c say the damages were too small.

Rule refu

HOYT *v.* STOCKTON and another.

In answer to an application for judgment as in case of a nonsuit, where the array had been challenged at the trial, and the panel quashed in consequence of the Sheriff being related to defendant, the plaintiff's attorney stated that he did not issue a *venire* to the Coroner, in consequence of a statement of the defendant's attorney, leading him to believe that there was no relationship between the Sheriff and defendant. The Court ordered the application to stand over in order that the defendant's attorney might answer the affidavit.

S. R. Thomson, Q. C., on a former day in this term, moved for judgment as in case of a nonsuit, on the ground of the plaintiff not having proceeded to trial pursuant to notice. It appeared that when the case came on for trial the defendant's counsel challenged the array, on the ground that the sheriff was related to Stockton, one of the defendants, whereupon the panel was quashed.

Wetmore, Attorney General, opposed the motion reading the affidavit of the defendant's attorney, which stated that before the trial he asked the plaintiff's attorney if there was any relationship between the sheriff and defendant Stockton, and was informed by him that he thought not, or that there was not, or words to that effect, and that if he had been informed there was any relationship existing between them, he would have issued a *venire* to the coroner, as he was anxious to have the cause tried. He contended that under these circumstances the defendants were not entitled to judgment.

Per Curiam. In this case the plaintiff's attorney alleges that he did not issue a *venire* to the coroner in consequence of a statement of the defendants' attorney, to whom he applied, leading him to believe that the sheriff was unconnected with either of the parties. We think Mr. Morton, the defendants' attorney, should have an opportunity of answering this affidavit if he desires to do so. The cause may be entered on the motion paper of next term by either party, and may be heard on the application of either party on the affidavits now on file, and on any further affidavit the defendants' attorney may produce on the point above referred to.

he should get out that winter. Rideout denied making any agreement, or making any delivery of logs to the plaintiff bey the 94,000 feet. He also denied, on cross-examination, that on 7th May he had examined the plaintiff's account against him, sh ing a considerable balance due the plaintiff, and had signed his n to the account in the plaintiff's ledger. The defendant claimed logs in dispute under a purchase from Isaiah B. Rideout, a bro of Nathaniel Rideout, and one of the principal questions at the was, whether there was any *bona fide* transfer from Nathanie Isaiah B. Rideout, or whether it was collusive, and for the pur of defrauding the plaintiff of the amount due him. Nathaniel R out swore that he sold and delivered the logs to his brother, in sideration of his agreeing to pay the wages of the men who been hired to get the logs, and also to pay certain debts due f him (Nathaniel) and for which his brother was also liable as s rity. Nathaniel Rideout left the Province immediately after delivery of the logs to his brother. The evidence was very conf ing on many points—particularly in respect to the alleged agreem between the plaintiff and Nathaniel Rideout in February, and delivery of the logs under it in May, 1866, and also as to the set ment of the account by Rideout in the plaintiff's ledger. The bo containing the account was produced, and both the plaintiff and clerk swore that Rideout signed it in their presence. Rideout called, subject to objection, to rebut this evidence, and denied the signature to the account was in his hand writing. The lea Judge directed the jury that the written agreement gave the p tiff no property in the logs without a delivery, or unless he possession of them under the authority contained in it. That h a right to take possession of all the logs cut by Rideout if mo 100,000 feet, and keep them a sufficient time to enable him t the quantity and quality he was entitled to under the agr but if no act of that sort was done, the legal property rem Rideout, as the logs were cut by him on his own land, and dispose of them. That the plaintiff's right to recover principally upon the alleged agreement of February, and th on the 7th May; that if such agreement and delivery w the plaintiff was entitled to a verdict, because after suc Rideout would have no property in the logs to transfer to h under whom the defendant claimed. That to enable the to recover, they must be satisfied that there was a *bona fi* delivery from Nathaniel Rideout to Isaiah B. Rideout.

Verdict for the defendant on the 1st and 2nd pleas.

S. R. Thomson, Q. C., in Michaelmas Term last, mov

"years used the dam differently, and overflowed the land in a dif-
"ferent manner and at different seasons, he would not be justified in
"doing so." The jury having found for the defendant.

Palmer, Q. C., on a former day in this term, moved for a rule *nisi* for a new trial on the grounds. 1. Misdirection. 2. Verdict against evidence. He contended that the user must be strictly co-extensive with the right claimed, and if there was any substantial variation the plaintiff was entitled to recover. Onley *v.* Gardner (4 M. & W., 496) is in point, and holds that an easement is lost by interruption, and not being continuous. Here the flowage of water was not continuous, for it was only within six or seven years the owners of the mill kept the water up and sawed in summer. [RITCHIE, C. J.: The defendant contradicts this, and alleges that the former proprietor sawed in summer.] The defendant must shew a continuous occupation in the same way, and not having done this the learned Judge should have told the jury that the plaintiff was entitled to recover. Drewell *v.* Towler (3 B. & Ad. 735). Garritt *v.* Sharp (3 A. & E. 330).

Cur. adv. vult.

ALLEN, J., now delivered the judgment of the Court.

The substantial controversy in this case appears, by reference to the Chief Justice's notes, to have been, whether the dam originally erected, whereby the water was backed up on the plaintiff's land, has been raised when repaired by the defendant, so as to overflow more land than the dam originally did; and the question now raised, as to keeping the water up all the year round by the defendant, in a manner different from the way in which it has been kept up by the previous proprietors, was not opened by the plaintiff's counsel as a cause of complaint or raised on his case, or alleged by him in his evidence as a wrong, but arose in consequence of a statement made by the defendant in the latter part of his cross-examination. The Chief Justice left the case to the jury as follows:—"Was there a "dam and mill erected on the stream by the proprietors below, which "backed up the water on the plaintiff's property to the extent it "now is; and was that kept and maintained continuously and unin-"terruptedly for twenty years previously to the bringing of this "action? If it was, then the owner of the land so overflowed can-"not complain. But if there was a dam which only partially over-"flowed the land, and not to the extent it is at present, and the "defendant within twenty years raised that dam, whereby more "land was overflowed than the original dam covered, then, for such "extra overflowage he would be liable; or if, by the original dam,

"and the way it was used, the land was overflowed only in a par "ticular manner and at particular seasons, and the defendant ha "within twenty years used the dam differently, and overflowed th "land in a different manner and at different seasons, he would no "be justified in doing so." We think this direction was right, an we are not quite satisfied that the jury were not justified in findin that the dam was used and the land overflowed, substantially in th same manner by the defendant, and the former proprietors, sinc the erection of the dam. But as it is possible that this questio may not have been so fully considered by the jury as it would hav been had it formed part of the plaintiff's original case, and as th verdict will bind the rights of the parties, we are disposed to gran a rule for a new trial on the ground of the verdict being contrar to evidence. The plaintiff may take a rule *nisi* on that ground.

DOE dem HICKMAN *v.* KING.

The deed of a lunatic is not absolutely void but voidable, and can only be avoided b the grantor or his representatives.

After a conveyance of land made by a person of unsound mind, a tenant for years the land paid rent to the grantee. Held, After the death of the tenant that h widow was estopped by the payment of rent, from denying the title of the grante

Ejectment tried before Ritchie, C. J., at the last Westmorland Ci cuit. It appeared that the defendant's deceased husband had hel the land in question under a seven years lease from one Coll, wh previous to its expiration, conveyed the fee to the lessor of the plai tiff. After the lease expired, the defendant's husband continued t occupy as tenant at sufferance; and evidence was given by the le sor of the plaintiff to show, that subsequent to this the husband ha paid rent to him as landlord. This was denied by the defendan The defendant's counsel tendered evidence to show that at the tim of Coll's making the deed of the land to the lessor of the plainti he was insane, and then on his way to the lunatic asylum. Th evidence was rejected by the learned Judge, on the ground that th tenant had no *locus standi* to raise the question as against the lan lord. He submitted to the jury whether Hickman, after receivin the deed, communicated it to the defendant, and whether defendar dealt with Hickman as landlord and paid him rent. The jury, b five to two, found that defendant had done so, and rendered a ve dict for plaintiff.

D. S. Kerr, Q. C., on a former day in this term, moved for a rule *nisi* for a new trial, on the ground of improper rejection of eivdence of Coll's insanity. He contended, that he being insane when the deed was made, no property passed, but it was wholly void. Although the defendant stood here merely as tenant at sufferance, there was a privity of estate between her and the original lessor, and therefore she did not stand there as a mere wrongdoer or a stranger, and it was competent for her to set up the insanity of the original lessor. Thomson *v.* Leach, (1 Lord Raymond 313), declares that if it be a thing to which *non est factum* may be pleaded, it is void, and any stranger may take advantage of it. Yates *v.* Boen, (2 Stra. 1104). [RITCHIE, C. J.: Can a stranger come in and set up insanity which the man's heirs do not attempt to set up?] Defendant is not a stranger here, but a privy, and if the deed of an insane man is absolutely void, it is of no effect against third parties. In 3 Parsons on Contracts 460, it is stated that a lunatie cannot bind himself by contract save for necessaries. [RITCHIE, C. J.: The question is just whether the deed is void or voidable, and whether when a party or his heirs do not set up the insanity a stranger can.] The defendant was not a stranger, but had a right to remain on the land as tenant at sufferance until the license was revoked, and had trespass been brought against defendant without any entry, it would have been defeated. Beavan *v.* McDonall, (9 Exch. 309, 26 L. & E. 540); Gore *v.* Gibson, (13 M. & W. 623); Price *v.* Berrington, (15 Jur. 999); Molton *v.* Camroux, (12 Jur. 800, 2 Exch. 497); Alcock *v.* Alcock, (3 M. & G. 268).

Cur. adv. vult.

ALLEN, J., now delivered the Judgment of the Court.

It cannot be said that the deed under which the lessor of the plaintiff claimed in this case was void. At most it was voidable; but if so, it could only be avoided by the grantor or his representatives, the contrary of which position this defendant occupied. This case is rendered more clear by the fact that the defendant's husband had recognized the lessor of the plaintiff's title as landlord, by paying him rent; and therefore it is quite clear that while she cannot set up the first ground to cut down the plaintiff's deed, she is estopped by the payment of rent from denying his title.

Rule refused.

SIROIS *v.* HAMMOND.

Where the defendant challenges the array on the ground of affinity between himsel and the sheriff, and the challenge is sustained, defendant is entitled to the costs o the day, as a general rule.

H. B. Rainsford, on a former day in this term, moved for costs o the day on the ground of the plaintiff not having proceeded to trial according to notice. It appeared that the cause was duly entered fo trial, and that when it was called on, the defendant's counsel chal lenged the array, on the ground that the sheriff was related to th defendant, and the challenge being sustained the cause was not tried

Cur. adv. vult.

ALLEN, J., now delivered the judgment of the Court.

This was an application for costs of the day, in consequence of th plaintiff not proceeding to trial according to notice. The cause wa entered for trial, and on its being called on the defendant challenge the array, on the ground of affinity between himself and the sheri who summoned the jury. The challenge was sustained, and the tria therefore did not take place. The defendant clearly had a right t a proper jury—summoned by a proper officer, and having come pre pared for a legal trial, which it was plaintiff's duty to provide, w think the defendant should be compensated for the expense he wa put to in preparing for such trial, as far as the ordinary terms i such cases will do so, he not being in any fault. We lay this dow as a general rule. We will not say there may not be exceptiona cases, where we should refuse to give costs; as for instance, if th plaintiff was misled, and induced to send a *venire* to an interest officer through the acts or representations of the defendant or hi Attorney.

Motion granted.

CONDELL *v.* PRICE.

A constable who executes a capias in a suit in which he is the plaintiff, is not entitle to notice of action before being sued for the arrest.

Matter of justification in trespass, cannot be given in evidence in mitigation of dam ages, under the general issue.

This was an action for assaulting and beating the plaintiff, an unlawfully detaining him in custody until he discharged a clai which plaintiff denied his liability to pay. Plea—the general issu At the trial before WELDON, J., at the last King's Circuit, it appeare that the plaintiff had been arrested by one Ryan, who took him fro his school-house to Sussex, a distance of several miles, and hande

him over to the defendant, who assaulted him and detained him in custody until he discharged the claim. For the defence, an affidavit of debt and capias, issued by a Justice of the Peace, against the plaintiff, at the suit of the defendant, were offered in evidence in mitigation of damages, but rejected by the learned Judge on the ground that such evidence was matter of justification. It was also contended that the defendant, being a constable, was entitled to notice of action. The learned Judge told the jury that a person could not act as constable in a cause to which he was a party, and that, therefore, the defendant was not entitled to notice. Verdict for the plaintiff.

Skinner, Q. C., on a former day in this term, moved for a new trial on the grounds of misdirection and improper rejection of evidence. 1. The 1 Rev. Stat., cap. 137, § 11, says the capias shall be directed to "any constable of the county." [RITCHIE, C. J.: Does not that mean any competent constable?] I do not see why a man cannot act as his own constable, when he can take a distress for rent for himself, which is a much higher power. I have not been able to find any decision shewing that a man cannot act as constable in his own cause, and therefore I think the learned Judge went too far in directing the jury as he did. 2. If the capias could not be given in evidence under the general issue as matter of justification, it might in mitigation of damages. [RITCHIE, C. J.: Can you find any case to go that length?] Gibben *v.* Pepper (2 Salk., 637) shews that a defendant may justify in trespass under a plea of not guilty, and in 2 Starkie on Ev., 1119, it is said that before the late rules of pleading, the defendant might shew that the plaintiff had parted with the possession at the time of the trespass, or that the property had been devested by forfeiture. [ALLEN, J.: That might go to shew that the plaintiff had no right to the goods, and therefore there was no trespass.]

Cur. adv. vult.

ALLEN, J., now delivered the judgment of the Court.

A rule for a new trial was moved for in this case, on the ground that the defendant, being a constable, was entitled to notice of action. It is true that the defendant may in fact have been a constable, but the alleged acting as constable was in a case where he was the plaintiff, and therefore could not act as constable. No justification was pleaded, and the party who first arrested the plaintiff was one Ryan, who may have been a constable; and had the action been brought against him, might have been entitled to notice. Ryan, by direction of the defendant, arrested the plaintiff, took him from his school

several miles to Sussex, and there handed him over to defendan who assaulted him and detained him in custody, till he discharge the claim for which he had been arrested by the defendant's dire tion, and which he (the plaintiff) throughout denied his liability t pay. Under these circumstances, there is no pretence for saying th defendant was entitled to notice of action. The other objections r solve themselves into a question of the rejection of evidence, viz: th the learned Judge refused to receive in mitigation of damages, th affidavit of debt and capias issued by a Justice of the Peace, at th suit of the defendant against the plaintiff, and under which the d fendant alleged that the arrest of the plaintiff was made, and th acts complained of were done. We think the learned Judge wa right in rejecting this evidence. If the defendant wished to ava himself of those proceedings he should have justified. It is quit clear that matter of justification cannot be given in evidence und the general issue in mitigation of damages. In Spech v. Phillip (5 M. & W. 281), Lord Abinger says: "It is a principle as old as m "recollection of Westminster Hall, that matter of justification cann "be given in evidence in an action, in order to mitigate the damage "In an action of assault against the sheriff, if he pleads not guilt "only, he cannot give evidence of his writ in mitigation of dan "ages." See also Fraser v. Berkeley (7 C. & P. 621). The rule wi be refused.

Rule refused.

STEVENS v. HAMILTON.

Where a motion for judgment, as in case of a nonsuit was pending, the Court d charged, with costs, a motion for costs of the day for the same default.

Wetmore, Attorney General, moved for the costs of the day, o the ground that the plaintiff had not proceeded to trial pursuant notice. A motion for judgment as in case of a nonsuit for the sa default had previously been made in which the Court took time consider.

Straton opposed the motion, contending that a motion for juc ment as in case of a nonsuit for the same default having been alrea made, the defendant was not in a position to move for the costs the day. Arch. Prac. 1110.

Per Curiam. The application for costs for not proceeding to tri cannot be granted. A motion for judgment as in case of a nons for the same default having been made, this motion was unnecess and it must be dismissed with costs.

HARLEY *v.* GOODFELLOW.

An account containing debits and credits was presented by the plaintiff to the defendant, who admitted it to be correct, but refused to sign it, alleging that there might be other credits to which he was entitled, and for which he required time to consider. Held, That this did not prove an account stated.

One item in an account of money paid by the plaintiff for the defendant, appeared on cross-examination to have been paid under a written agreement by the defendant to deliver goods to the plaintiff. Held, That without production of the agreement the plaintiff could not recover on this item.

Indebitatus assumpsit to recover $94, tried before ALLEN, J., at the last Northumberland Circuit. The plaintiff relied on an account stated, and for the purpose of proving it, gave evidence to shew that on presenting the account, which contained debits and credits, to defendant, he admitted that the debits were correct, but refused to sign the account, on the ground that there might be some credits omitted to which he was entitled. One item of $100 on the debit side of the account was for money advanced by the plaintiff to the defendant, on a written agreement made between them, that defendant should deliver plaintiff a certain quantity of fish. The plaintiff's counsel proposed to ask the defendant whether, on the date of the agreement, he had agreed to sell plaintiff a quantity of fish, but on it being objected that the contents of the agreement could only be proved by the writing itself, the evidence was rejected by the learned Judge.

The defendant's counsel moved for a nonsuit on the ground that no account stated had been proved, that the general admission by the defendant that the account was correct, was not evidence of the item of $100 advanced under the written agreement, unless the agreement itself was produced, and that if the item was omitted from the account it would show a balance in favor of defendant. The learned Judge ordered a nonsuit, with leave to the defendant to move the Court in banc to set the nonsuit aside.

Needham, on a former day in this term, moved to set the nonsuit aside, contending that the admission of the correctness of the account was sufficient to entitle the plaintiff to recover.

Cur. adv. vult.

ALLEN, J., now delivered the judgment of the Court.

We think there was no account stated and settled in this case, because defendant expressly refused to state and acknowledge the balance, alleging there might be other credits to which he was entitled, and for the investigation and ascertainment of which he claimed and took time for further investigation. The admission of

the $100 might have been good evidence under a count for money paid by plaintiff for the use of defendant, had it not appeared that the sum was paid under a written agreement, which plaintiff declined though the paper was in Court to produce. Without the production of this it was impossible for the learned Judge to say that it was a sum properly recoverable by the plaintiff against defendant, and as without the allowance of this amount there was on plaintiff's shewing nothing coming to him, but in fact, a balance clearly in defendant's favor—the learned Judge rightly nonsuited the plaintiff. As to the rejection of evidence, Mr. Needham proposed to ask defendant whether, on the 11th July, 1865, he had agreed to sell plaintiff ten barrels of salmon. On defendant's counsel interfering, it appeared that the agreement for the sale of the salmon was in writing—and he objected that the contents of the agreement should not be proved except by the writing itself. The learned Judge rejected the evidence, and we think rightly so.

Rule refused.

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*MACPHERSON v. THE FREDERICTON BOOM COMPANY.

Where a contract is to be made out partly by written documents and partly by parol evidence, the whole becomes a question for the jury.

The plaintiff claimed lumber under a letter written to him by A, the maker of the lumber, stating that part of a quantity of lumber in the river, which part was distinguished by a particular mark, was for the plaintiff, and requesting the plaintiff to send money and provisions to A to drive the lumber. Plaintiff sent the money and provisions to A, and furnished the marks of the lumber to the defendants, a company incorporated for the purpose of picking up and rafting lumber, and afterwards obtained a portion of the lumber from them. Held, That the letter was an appropriation of the lumber by A to the plaintiff, and that his subsequent acts were an assent to such appropriation, which vested the property in him.

Where a plaintiff stated in evidence that he claimed property under a written agreement which was not produced, but a letter was afterwards put in evidence, which with other facts, were sufficient to vest the property in the plaintiff, and the jury were directed that without such letter and subsequent facts the plaintiff had shown no right to the property, the non-production of the written agreement was held immaterial.

This was an action on the case for refusing to deliver to the plaintiff a quantity of lumber received by the defendants for the plaintiff. The declaration stated that whereas the defendants being incorporated by Act of Assembly, 7 Vict., c. 34, and having booms, &c., near the short ferry for the more convenient collecting, rafting, &c., timber, logs, &c., floating down the river St. John, it became by law the duty of the defendants to keep the said boom opened from the

*This case was decided in Trinity Term.

spring after the river was clear of ice, to the 20th October in each year, and to collect and float down to their boom, and there secure and raft in joints, all timber, logs, &c., floating in the river St. John, or aground on the islands and bars below Crock's point, provided the owner should have previously furnished the defendants with the marks of such timber, logs, &c., after which it was to be under the control of and liable to boomage to defendants. That the plaintiff being the owner of a certain large quantity of spruce logs floating in the river St. John, did, previously to such logs coming to Crock's point, to-wit, &c., furnish the defendants with the marks of such logs; yet the defendants, not regarding their duty, &c., refused to raft the said logs for the plaintiff, but wrongfully, &c., rafted and delivered them to other parties, by means of which, &c. There was also a count in trover.

At the trial before ALLEN, J., at the York Sittings in January last the plaintiff claimed the lumber as having been cut for him by Harper & Tracey, on the Tobique, in the winter of 1859–60. The lumber did not come out of the Tobique till the spring of 1861, when the plaintiff furnished the marks to the company, as required by the Act 7 Vict., c. 34, and soon afterwards received from them a small portion of the lumber, which was sawed in his mill. It appeared that the lumber was got by Harper & Tracey under a written agreement with the plaintiff, which agreement was not put in evidence. It also appeared that in the summer of 1860, Harper and Tracey had applied to the plaintiff to accept a delivery of the lumber on the Tobique, and that he had refused to do so, and had taken their note for the amount of supples advanced by him to enable them to get the lumber, and some evidence was given that he had obtained judgment against them on the note. Harper & Tracey continued to cut lumber on the Tobique in the winter of 1860–61, but the plaintiff had no interest in it. On the 16th February, 1861, Harper wrote to the plaintiff requesting him to send some money, pork and flour, to enable them to drive the lumber in the spring, in which letter he stated: "I want you to get some party to pick up our lum-" ber, old and new. The old logs is marked H x T x and x K x. " These marks is for yourself. The new logs is marked H. ||; they " will be for Jackson Tracey." In consequence of this letter, the plaintiff furnished Harper & Tracey with money and supplies to drive the lumber, to the amount of between $300 and $400 (about sufficient to drive his portion of the lumber), and it was driven down the river St. John, with the lumber belonging to Harper & Tracey, marked H. ||, to the vicinity of the boom, where it was picked up and taken charge of by the Company's servants. While the lumber was coming down the river the plaintiff furnished the company with

the marks H x T x and x K x as his lumber. Tracey also sent to the company a list of the three marks, requesting them to pick up and raft the lumber for Harper & Tracey. This was received by the company a few days before the list sent by the plaintiff. After part of the lumber had got within the boom, and while the remainder was coming down the river, Tracey applied to the plaintiff for more money to pay the expenses; the plaintiff refused to advance any more and told Tracey he must apply elsewhere. Tracey then obtained £400 from Estabrooks & Tracey, and about the 10th June delivered the whole of the lumber to them as security for the amount; after which the company held the lumber for Estabrooks & Tracey. In June, and after the delivery to Estabrooks & Tracey, the plaintiff applied to Tracey, of the firm of Harper & Tracey, for a delivery of the lumber, but he stated that he had delivered it to Estabrooks & Tracey, and that it could only be given up on payment of the amount advanced by them. The plaintiff afterwards applied to Harper for a delivery. A nonsuit was moved for on the ground that the written agreement, under which the plaintiff claimed the lumber, should have been produced; but the learned Judge held that the plaintiff had shewn a *prima facie* case of possession without the agreement, which would entitle him to recover against the company unless they shewed a right to the possession. In leaving the case to the jury His Honor told them that it was immaterial whether the plaintiff or Harper and Tracey had first furnished the company with a list of the marks, as the question must turn upon the ownership of the lumber. That Harper & Tracey being the makers of the lumber were *prima facie* the owners, and had the right to deliver it to any person they pleased. That the plaintiff had shewn no right to it unless Harper's letter of the 16th February gave him the right, and it was a question for them, looking at the previous and subsequent acts of the parties, whether it was their intention that the property should pass, and whether the plaintiff had assented to receive it. That the plaintiff's applying to Tracey in June, and afterwards to Harper for a delivery of the lumber, was inconsistent with his having the property under Harper's letter. Verdict for the plaintiff $1,787.

Wetmore, Attorney General, in Easter Term last, obtained a rule *nisi* for a new trial, on the grounds—1. Misdirection in not telling the jury that the plaintiff could not recover, without the production of the written agreement between him and Harper & Tracey under which he claimed. 2. In not telling the jury that no property passed by Harper's letter. 3. Verdict against law and evidence.

Needham and *Fraser* shewed cause on a former day in this ter—

The plaintiff was not bound to produce the agreement, all he had) do was to make out a *prima facie* case of ownership to recover gainst the defendants. They had no property in the lumber, they rere merely the agents for the owner, and the evidence shows that ley treated plaintiff as the owner. He delivered the marks of the imber to them, and they afterwards delivered to him part of the mber. The only way in which the defendant can get rid of the *rima facie* case is by setting up ownership in a third party, which ey have not done. The production of the agreement would not ve strengthened our case, for it conueyed no property. At a late ıge of the case we offered to put the agreement in, the defendant ut it out and they are estopped. 2. There was no misdirection in ıving to the jury whether Harper's letter vested the lumber in the ıintiff. It was a question properly left to them, and one which e learned Judge was not bonnd to decide. 3. The evidence was rtainly all in favor of the plaintiff's claim; it was perfectly natural at Harper & Tracey should deliver the lumber to plaintiff as curity for the supplies advanced to him.

Wetmore, Attorney General, contra. 1. Where a party claims ıder a written agreement, as the plaintiff does in this case, it should produced. The plaintiff swore that he claimed under it, and it ɔuld therefore have been in evidence at the proper time; the fact it being tendered by plaintiff at an improper time, and shut out us, does not estopp us. 2. The learned Judge should not have mitted the intention of Harper's letter to the jury, for the right ıg sought to be transferred by a written document, the Judge ld have construed that document. The parties who cut the ɔer were *prima facie* the owners, and the jury should have been ted that this letter without any delivery passed no property. ıe verdict was against evidence for the *prima facie* case of ship in Harper & Tracey is not cut down. There is no act of iff's which shewed that he claimed to own the lumber except livery of the marks to the defendants, and this is surely not ıt to cut down the title of Harper & Tracey.

Cur. adv. vult.

HE, C. J., now delivered the judgment of the Court.

e no ground for disturbing the verdict in this case, as we ıe question was properly left to the jury upon the effect of letter of the 16th February, 1861, and the subsequent acts aintiff. Where a contract is to be made out partly by writments and partly by parol evidence, the whole becomes a

question for the jury. Bolckow v. Seymour, (17 C. B., N, S. That letter was an appropriation by Harper & Tracey to the tiff of the lumber in dispute, and when he furnished the ma that lumber to the Boom Company, and followed it up by exe acts of ownership over it; by actually receiving a part of it the company who thereby recognized his ownership, and sav in his mill, it was a clear adoption of the act of Harper & T and an assent to the appropriation which was sufficient to ve property in him. Campbell v. The Mersey Docks, (14 Com. B 412); Young v. Matthews, (Law R., 2 C. P., 127). In addit this, the plaintiff furnished Harper & Tracey in March 1861 money and provisions to the amount of between $300 and $4 the purpose of driving this very lumber. The defendants h full benefit of the non-production of the agreement under the plaintiff stated that in part he claimed the lumber, by the J direction that the property remained in Harper & Tracey unles parted with it, by the letter of the 16th February. We think ever, the plaintiff shewed a sufficient *prima facie* case as a the Boom Company, by the letter and his acts under it, witho production of the agreement. The acts of the plaintiff, whi relied on to shew that he had no property in the lumber, name sending his clerk to Woodstock in June to get a delivery lumber, and his subsequently appying to Harper in St. John delivery, could not have the effect of devesting any property he took under the letter of the 16th February. They were n of precaution, which he might consider necessary to strength claim. His refusal to take delivery of the lumber in the wood his settlement with Harper & Tracey and taking their note f amount of his account, both took place in 1860, the year befo lumber came out of the Tobique. The evidence of his l recovered a judgment against Harper & Tracey was very vag it was not shewn that they had paid him any thing. All thes matters for the consideration of the jury, and of which the defe had the benefit in the Judge's charge. The rule for a new tri therefore be discharged.

Rule dischar

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NEW BRUNSWICK,

IN HILARY TERM,

IN THE THIRTY-SECOND YEAR OF THE REIGN OF QUEEN VICTORIA.

THE QUEEN *v.* THE COMMISSIONERS OF SEWERS OF THE GERMANTOWN LAKE DISTRICT.

FEBRUARY 5, 1869.

An assessment made by Commissioners of Sewers, under 22 Vict., cap. 53, § 10 must be upon the owner of the land by name, and not upon the land itself.

K., a Commissioner of Sewers for the Germantown Lake District, became contractor for the execution of certain work executed under their direction, and afterwards sat and voted with the other Commissioners, when they decided that the work had been satisfactorily performed, and ordered an assessment on the land owners to pay for it. Held, That the assessment was bad.

An owner of land in the Germantown Lake District is disqualified from acting as a Commissioner of Sewers for that District, the duties of such Commissioners under 22 Vict., cap. 53, being of a judicial character.

Where it appeared to the Court that a former decision was inconsistent with the right application of a clear and well established principle of law, it reversed the former decision without the intervention of a Court of Appeal. Allen, J., without differing from the rest of the Court as to the principle of law, thought that the Court having, in Calhoun's case, decided that persons were not disqualified from acting as Commissioners by reason of being land owners, the Court was bound by that decision until reversed by a Court of Appeal.

A. L. Palmer, Q. C., in Hilary Term last, moved to quash the bill of assessment and all proceedings under it brought up by *certiorari*, on the grounds:—

1. Because in the assessment in one instance, the land is assessed instead of the owner of the land.

2. If this is not clear it is uncertain whether the land or the owne is assessed, or whether Joseph W. Turner or Elisha P. Turner, o both, and if so, there is no distribution to show how much each i to pay.

3. Some of the commissioners, particularly Tingley and Kinni are interested both in the work to be done and in the distribution c the assessment; being liable themselves to be assessed and therefor interested, and not competent to be appointed commissioners, and i appointed, not warranted in acting.

4. Michael Keiver, another commissioner, was materially intereste in the subject matter to be decided, previously to the ordering of th assessment, being interested in the contract and the work for whic the assessment was made. The facts are fully set out in the judg ment of the Court.

A rule *nisi* being granted,

D. S. Kerr, Q. C., shewed cause in Easter Term. Two classes c objections have been taken against this assessment, one that th parties who made it as commissioners are interested, and the othe that the land is not sufficiently designated.

1. As to the matter of interest, if this is to prevail, there is a end to the draining of the lake, for no man who is not intereste will take the trouble to act as commissioner, in the face of the diffi culties opposed to it. This is not like the case of a Judge, where slight degree of interest precludes him from acting. In the case c a commissioner, interest is the whole motive to act. The Legislatur has made no provision for the bringing in of parties outside of th County to act, and no provision for paying them. In this case th job was first let to a man who did not fulfil his contract, and Keive comes in and offers to do it at the same rate; so there can be no pr tence of wrong from the fact of his being a commissioner. But is contended that being a commissioner he is disqualified, but why If Kinnie had fulfilled his contract Keiver was quite competent t assess for the price of the work, and that price had been fixed befo Keiver became a contractor. And if for the purpose of securing th completion of the work, which it was his duty to do, he undertak to do the work himself, why should he be incapable of making th assessment.

2. The objection that the assessment was made on the land ar not on the party, is too purely technical to prevail. Coupled wi the notice the assessment was explicit enough, and the parties cou not have been misled by it. Turner does not attempt to deny th

the title to the land was in him. He is the party who complains that he is injured by the assessment; the sum for which he says he was assessed and the sum assessed on this land, correspond, and he admits the sum was put down to him, so he clearly was not misled.

A. L. Palmer, Q. C., contra. The iniquity of this assessment is sufficiently apparent on the face of the papers. Turner had been assessed $1,200 previously, and is assessed $1,240 now, and although the sum does not affect it, I think that in a British Court of Justice a man's property cannot be taken from him except by process of law. Suppose it was competent for the Government to appoint as commissioners parties who were interested, Keiver's duty as a commissioner was to see that the owners of the land had justice done to them in this Court of commission, but had he a right to take a bribe or to take a contract? My client had a right to know that the contract was fulfilled before the money was paid, but here the sum was passed to the credit of Keiver before the work was finished, and it is not finished yet. The origin of the Court of Commissioners of Sewers was *Aula Regis*. The remotest interest in a Judge disqualifies, and these Commissioners stand in the position of Judges, as may be seen by the Act by which they are appointed.

The second point is not so important, but it is equally plain and the Court has passed on it before. The process is not against the land but against the goods, and in default of them, on the land. The notice of assessment does not state that my client owned a foot of land, and the law says the assessment shall be upon the owners of the land, therefore the law has not been complied with.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the majority of the Court.*

In Trinity Term, 1867, Mr. Palmer moved on behalf of Elisha P. Turner for a rule *nisi* for a *certiorari* to bring up an assessment made by the Commissioners of Sewers for the Lake District of Albert County, on an affidavit of said Turner that he was owner of two hundred and forty-eight acres of marsh land in Germantown Lake District, which the commissioners formerly assessed for $1,136. That since such assessment the Government had appointed Edward Stevens and Joshua Bishop additional commissioners. That the commissioners now are Agrean Tingley, Michael Keiver, Thomas W. Kinnie, Edward Stevens and Joshua Bishop. That the said Agrean Tingley is owner of seventy-one acres of land assessed in the said district

* Ritchie, C. J., and Weldon, J.

for only $3,20 per acre, and most materially interested in the works carried on, and also the assessment to be made, That W. C. Keiver, the son of the said Michael Keiver, is owner of forty-seven acres in said district, for which he is assessed only $176.75. That the said Thomas W. Kinnie is owner of lands assessed in said district; quantity unknown. That his father and five brothers have lands and are assessed in said district, and that they are near relations to a great many of the other persons assessed in the said district. That the said Edward Stevens' daughter is married to the son of the said Michael Keiver. That deponent has understood that George Berryman, an owner of twenty-five acres in said district, has, after paying £45 assessment, conveyed to said commissioners the said lands, they agreeing not to make him pay any further of his assessment. That one Solomon Pearson, the uncle of the said Kinnie, has seventy-seven acres in said district, and has been assessed $60.90 only. That the only work done by the said commissioners is the cutting a cana into Germantown Lake, which is cut through the lands of the sai Agrean Tingley and Michael Keiver, which the latter afterwards sol to the said Solomon Pearson. That the principal benefit done by said canal is to the said lands of Agrean Tingley and the lands o the said Keiver so sold. That the canal is of little benefit to de ponent's land; that he has at great expense drained his own lands and in doing so has drained the lands of the other proprietors, s that they have more benefit from his work than he has from their for which he received no credit or benefit. That the draining o the said lake is a positive damage to deponent's land. That sinc the former assessment the principal work done has been the diggin of a canal out of the lake, which job was taken by Elijah Kinni the brother of the said Thomas W. Kinnie, for the sum of £68 which contract was afterwards transferred to the said Michael Keive and professed to be done by him and his sons and one Daniel Clev land, for which they now claim the payment. That the said Keive and the other commissioners have allowed their accounts, most which are allowed as due to the said commissioners themselves an the said sons of the said Keiver and the said Daniel Clevelan d. That deponent does not know the exact amount allowed to the m. That such contract was in writing, and is in the hands of the sa id commissioners, and has not been performed, notwithstanding t he same has been allowed for, and the sum of £1,075 3s. 2d. has be n by said commissioners ordered to be assessed upon the said distri ct, and the assessment made up, as defendant has been informed, to the 17th December last. That deponent called upon James Carnworth, the clerk of said commissioners, and he informed deponent that such assessment was made out against the land of deponent for the sum

of £310, and not against deponent himself, and that he had taken proceedings to have the said land sold by advertising the same in the *Royal Gazette*. That deponent's lands are all on one side of the Shepody river, and the canal made is of little use to deponent. That deponent has always protested against the proceedings of said commissioners and the proprietors on the other side, who are mostly related to some of the commissioners, and some of whom are the commissioners themselves. That the interests of the said commissioners are entirely hostile to deponent, and deponent is convinced that they have been principally induced to do what they have done, for the purpose of benefitting their own and their relations' land at the expense of deponent. That although the said canal has been made so as to benefit deponent as little as possible, yet deponent's said land is assessed at an average of $5 per acre, and the average of the assessment on the other lands which have got the whole benefit is about $3.50 per acre. That deponent was advised and believed that persons interested had no power to act as commissioners of sewers, or to hold a court of commissioners of sewers under the said Act, and finding that there was no chance of justice in a court so constituted, he did not attend any of them. That the principal part of deponent's property is in the said lands, as without these he has scarcely enough otherwise to pay his debts, and if parties that are so materially interested are allowed to assess deponent or his land, to any extent they choose, for claims allowed by themselves as due themselves, such property, on which deponent has spent over £700, is of no value whatever to deponent. The grounds on which the rule was asked for were:

1. That the commissioners had no right to assess against land merely, and not against the person owning the land.

2. That the commissioners could not contract with themselves.

3. That commissioners could not allow bills due themselves except the remuneration allowed them by the Legislature.

4. That the commissioners could not act when interested.

A rule *nisi* having been granted in Michaelmas Term, cause was shown and affidavits were produced from the commissioners and their clerk, and from Thos. W. Kinnie and Daniel Cleveland, and some fourteen other persons.

The affidavit of Agrean Tingley, after setting forth that he was appointed commissioner in 1859, and has acted as such since that time; that the duties connected with the said office are onerous and troublesome, and that he has fairly, faithfully and honestly dis-

charged his duty without favor or partiality to any person, and tl the charges made against the commissioners in the affidavit Turner are absolutely untrue, goes on to allege that the assessme upon the property of Turner of $5 an acre is low compared wi the assessment upon the property of other persons, and that t reason why other lands are assessed less is that they are not ben fited to the same extent. That the rate of assessment varies fro ten cents to $5.50 per acre, according to the benefit received in th judgment of the commissioners. That there are several proprietors, among whom is Thomas W. Kinnie, one of the commissioners, Elijah Kinnie and Charles McNultin, whose lands, although adjoining the lands of Turner, are rated higher than his are. That he believes Turner has received more benefit and advantage per acre from the construction of the canal than any other person. That Turner can now cut seventy-eight tons of hay where none was produced before the canal was made, and which has resulted from the works connected with the said canal, and some of his land which was worth little or nothing before the canal was made is now worth £8 or £10 an acre, and made valuable by reason of said canal. That the work Turner refers to as having been done by himself would be of little or no avail were it not for the canal, for want of sufficient vent and no chance for the water to escape. He then denies the truth of Turner's statement as to the agreement in regard to George Berryman's property. He considers that Solomon Pearson's land was assessed fully as high as any other land in proportion to the benefit received, and that the land sold by Keiver to Pearson is outside the said district and was sold about the time of or shortly after the commencement of the canal. That M. Keiver is not, nor has he ever been, a proprietor of lands in the Lake District. That the statement that the principal benefit done by the canal is to the lands of Agrean Tingley and Michael Keiver is untrue, and that the proprietors do not participate in any benefit from the work of Turner as he alleges. That Elijah Kinnie made a contract with the commissioners, a copy of which is annexed and is as follows:—

Job No. 1.—To make and deepen the canal from the lake to Bennett's Point, so called, canal to be made not less than eighteen feet wide on top, twelve feet wide on bottom, seven feet deep from the line of the bog near the foot of the lake, with a gradual fall to the mouth of the Landry job, near the aforesaid Bennett's Point, to be completed two years from date, to the entire satisfaction of the commissioners, and if completed previous to the said date to the entire satisfaction of commissioners, job to be taken off contractor's hands, sold to Elijah Kinnie for £685. Dated the 4th day of November, 1863.

(Signed) ELIJAH KINNIE.

(Copy) JAMES CARNWORTH.

That this contract was subsequently, with the consent of the said Elijah Kinnie, performed by the said Michael Keiver to the entire satisfaction of all the commissioners; and the amount agreed to be paid therefor was very low, and the amount allowed was only the contract price, namely, £685, and the assessment made includes this amount, together with claims and other work done, and land damages and other legal expenses, amounting in all to £1075 3s. 2½d: that the amount assessed upon the lands of Turner was £310, which deponent believes just and equitable. That the commissioners caused notice of such assessment to be given to Turner. That he neglecting for two months after being called upon, the commissioners caused notice of letting to be published in the *Royal Gazette*, according to law, and the affidavit concludes with a reiteration of the incorrectness of the charge of misconduct and partiality, and reaffirms his endeavor to do his duty fairly and honestly, and his belief that he has done so, and that the other commissioners have done the same. The affidavit of Michael Keiver is almost a copy of that of Tingley, except that it makes no illusion to the contract with Keiver, nor to Keiver, Cleveland, or James Keiver's performance of any work under it. There is another affidavit of Keiver's, setting forth a true copy of the assessment made upon the lands of the different proprietors on the 14th December then last past. The affidavit of Thos. W. Kinnie is an exact copy of that of Tingley. The affidavit of Edward Stevens sets forth that he inspected the specification of the job let to Elijah Kinnie, which was let but not performed before his appointment as commissioner. That he exercised great care and his best judgment in examining the job, and was most particular before passing it. That on the first examination by the commissioners they decided that the canal was not the width on the top required by the specification, and they did not pass the job but directed the canal to be made wider. That some time afterwards they made a strict examination of the work, and were fully satisfied that it fulfilled the specification. The affidavit then alleges that in making the assessment he acted fairly, &c., and mentions others whose lands adjoining Turner's were assessed fifty cents more per acre, and lastly states that it has long been the practice to elect men as commissioners who were proprietors, and generally large proprietors, in the district for which they were elected. The affidavit of Joshua Bishop, after setting forth his services and experience as a commissioner, his knowledge of Turner's land and the benefit it has received from the canal, and that the lands of other proprietors have received no benefit from the canal cut by Turner, says that he has inspected the specification of the job, let to Elijah Kinnie, which was not performed and completed before his appointment as commissioner; that he

exercised great care and his best judgment in examining the jo and was most particular before passing it. That it was done in a respects according to the specification, before discharging the sa Elijah Kinnie from his liability. It avers the fairness of the asses ment, and denies the charge of miconduct and partiality. The af davit of James Carnworth, clerk, to the commissioners, sets for that the commissioners made up a bill of assessment on the 14 December last past. That the assessment on the lands of Elisha Turner is $1,240—$5 per acre. That the lands of Thomas W. & Kinnie are assessed at $5.50 per acre. That the said assessment made up to cover the expenses from the 26th day of April, 186 to the 14th day of December, 1866, then last past, amounting £1075 3s. 2½d, including the sum of £685, the contract price of th job let to Elijah Kinnie, together with other work done, land dar ages and other legal expenses. That the job, at the letting there was struck off to Kinnie at £685, and no more is allowed by th commissioners in making the assessment.

That defendant, by direction of the commissioners, notified Turn of the bill of assessment and the amount assessed against the sai lands; that Turner did not deny his liability to pay the said asses ment, and told deponent that he would endeavor to sell the propert and was then making an effort to do so. He states the notice letting in the *Royal Gazette*, and his belief that the commissione acted with fairness. He states the amount assessed against Geor Berryman, and that the statement of Turner, referring thereto, wholly untrue. The affidavit of Daniel Cleveland states his know edge of the land of Turner, that it has been greatly benefited by th canal, and the reasons why. That the ditch cut by Turner is of a advantage to the lands of the other proprietors, and without th canal is of little benefit to the lands of Turner, and that Turner h enjoyed great advantages from the canal. That deponent was the letting of the job to Kinnie, and that deponent, with the conse of Kinnie and the commissioners, agreed to perform, and has pe formed, one-third of the work so let to Keiver, and was to recei one-third of the contract price, and he has only been allowed by th commissioners that sum; that the whole job has been well and fait fully performed according to the specification, and that he believ the bill of assessment to be just and equitable. There are fourte affidavits of other parties fyled with a view of establishing the fa that it has been and still is the practice to elect proprietors co missioners; that the lands of Turner have been more benefited th others, that the job was performed according to specification, a that the commissioners acted fairly and equitably.

A rule absolute for a *certiorari* having been granted, and the wr

issued, commanding the said Agrean Tingley, Michael Keiver, Thos. W. Kinnie, Edward Stevens, and Joshua Bishop, Commissioners of Sewers for the Lake District, in the Parish of Harvey, and County of Albert, to send the records of the last assessment made by them upon the said district or the owners of the land therein, and also all and singular the records of the expenditure of all moneys expended by them and contracts made thereupon, which formed any part of the amount for which the said assessment was made. And also all notices, orders, warrants and proceedings before them, or in any way founded thereon, or relating thereto, to which writ the said commissioners have returned under their hands and seals, the last assessment made by them on said district or the owners of the land therein, and also all and singular the records of the expenditure of all moneys expended by them and contracts made thereupon, which formed any part of the amount for which the said assessment was made, and also all notices and proceedings before them, and all things touching the same in any way founded thereon, or relating thereto, as fully and perfectly as they had been made or taken by them or any of them. The said assessment so returned is headed as follows: "Bill of assessment made by the Commissioners of Sewers for the Lake District on the body of marsh land, bog land, and land covered with water, in said Lake District, from the 26th April, 1861, to 14th December, 1866." The said bill is then arranged in columns headed as follows:—Proprietors, No. of acres, rate per acre, amount of rate, amount paid, due from, due to. Under the first there appears to have been thirty-two proprietors holding forty-eight lots, and in the same column at the end, and following the names of the said thirty-two proprietors, is the following: "This land was let at public letting on the 3rd day of March, A. D. 1863, to Joseph W. Turner, to satisfy assessment amounting to £286 2s. 9d., less £2 awarded for right of way, for expenses from 6th day of June, 1859, to 26th April, 1861, with other costs against Elisha P. Turner, but up to the date of this bill of assessment, lease to the said Joseph W. Turner has not been recorded in the Registry Office of the County of Albert." In the other columns opposite this entry are under No. of acres, "248," under rate per acre, "$5," under amount of rate, "$1,240," under amount paid, ——, under due from, "$1,240," under due to, ——. The columns are not added up, but the whole number of acres appears to be 1,373; the rate per acre varies from ten cents to $5.50 an acre, which is imposed as follows:—

On 1 lot of	7 acres,		.....	10 cents.
1 "	7 acres,	1 rood,	.....	12
1 "	5 "	2 "	.....	14
1 "	3 "	3 "	.....	16

The Queen *v.* The Commissioners of the Germantown Lake District.

On 1	"	30	"			.....	50 cents.
8	"	106	"			.....	60
3	"	46	"	3	"	.....	90
1	"	40	"	2	"	.....	1.00
1	"	11	"	2	"	.....	1.50
12	"	236	"	3	"	.....	2.00
3	"	55	"	1	"	.....	2.50
1	"	60	"	3	"	.....	2.75
2	"	38	"	1	"	.....	2.80
1	"	49	"	3	"	.....	3.00
1	"	71	"			.....	3.20
1	"	100	"			.....	3.50
1	"	47	"			.....	3.75
2	"	52	"			.....	4.50
Land	"	248	"			.....	5.00
6	"	157	"			.....	5.50

The whole amount of rate under the column "amount of ı appears to be $4,298.64. Annexed to this bill is returned a made by Elijah Kinnie and James Kinnie, to Michael Keiver, A Tingley, and Thomas W. Kinnie, Commissioners of Sewers fo draining of Germantown Lake, appointed under and by virtue o Act of Assembly 22 Vict., cap. 53, intituled an Act to amend a to authorize the draining of Germantown Lake, in the Coun Albert, and their successors in office in the penal sum of $5,480, 11th November, 1863, which after reciting that the commissi had let, on the 4th November, the job of deepening of the canal the lake to Bennett's Point, so called, for the purpose of dra said lake, having given public notice, according to the specific thereto annexed; job described as job No. 1. and Elijah and J G. Kinnie having bid in the same for the sum of $2,740, to be as soon as the job is completed, or as the rate can be made u the assessment collected, as provided by law, was conditioned; if E. and J. G. Kinnie shall perform and complete job No. 1, ac ing to the said annexed specification, obligation to be void other &c. The specification annexed to the land is as follows: Job N To make and deepen the canal from the Lake to Bennett's Poi called; canal to be made not less than eighteen feet wide at twelve feet wide at bottom, seven feet deep from level of the near the foot of the lake, with a gradual fall to the mouth o Landry job near the aforesaid Bennett's Point, to be completec years from date, to the entire satisfaction of commissioners, taken off contractors hands. Sold to Elijah Kinnie, £685, date November, and signed by Elijah Kinnie. Annexed to this i following certificate signed by Elijah Kinnie. "This is to c that I, Elijah Kinnie, of Harvey, in the County of Albert, have t ferred to Michael Keiver of Harvey aforesaid, the whole of th on the canal iu the Lake District, bid off by me on Wednesda

th November, 1863, for £685, dated 3rd April, 1865"; and in the ame paper is written as follows: "We, the Commissioners of Sewers or the Lake District, do consent to the above named transfer, and vill direct our clerk to place to the credit of Michael Keiver on his ook £685. Dated 3rd April, 1865."

(Signed) AGREAN TINGLEY, MICHAEL KEIVER, THOS. W. KINNIE, } *Comrs. of Sewers Lake District.*

There are also annexed divers notes of sales of jobs, and of assessments on individuals, not necessary to be particularly adverted to, except the following: No. 6, which is a notice of the letting of job for the repairing of the canal dyke, on the 26th July, 1862, on which occasion jobs were let; job No. 4, to Agrean Tingley, one of the commissioners, for $8, with a memorandum at the bottom that jobs 2, 3, 4, and 5, were done according to contract and passed. No. 7 states that in August, 1862, in consequence of a breach in the dykes and danger of the marsh, five jobs for putting up dykes were let, of which Thomas W. Kinnie took one job at £12 6s., and Agrean Tingley another job at £11 17s. 7d. No. 10 is the notice of the letting of the job before referred to on the 4th November, and is dated 24th October, 1863. Under this notice is the following: "On 4th November, 1863, the commissioners met according to the above notice, and let one contract, viz., to Elijah Kinnie, one job £685." Then follows: "This job, after being worked at for some time by said Kinnie, was abandoned by him, and was completed by Michael Keiver, for the above sum, viz., £685." No. 11, is another notice of the letting of job No. 1, being dated 20th June, 1864." Then follows: "On 1st July, 1864, the commissioners met according to above notice and let one job, viz., job No. 1, to Agrean Tingley (a commissioner) for 12½ roods of dyke at 10s., £6 5s."; and under is written: "This job was completed and passed accordingly." No. 12 is another notice for letting jobs for the repairing of the canal and dyke on 11th July, dated 1st July, 1864. Then follows: "On 11th July, 1864, commissioners went and let one job to William Tingley, raising and topping dyke, $13.30." Then follows: "This job was abandoned by said Tingley and completed by Agrean Tingley, jr., (a commissioner) for the aforesaid amount, $13.30." No. 13 is another notice of letting on the 7th August, dated 26th July, 1865. Seven jobs were let. At the bottom follows: "These jobs were all completed and passed accordingly, with the exception of $2 deducted from George Berryman's job and completed by Michael Keiver, (a commissioner), and will appear to credit of Keiver accordingly." Then follows, annexed, a general statement of the expenses, &c., in ditching and draining German-

town Lake, from 26th April, 1861, to December 1866, showing tl jobs let and passed, amounting to £950 1s. 7d. Land damages, da works and work by commissioners as commissioners, making a tot of £1,075 3s. 2½d.. In this last portion of the statement is Agre Tingley's (a commissioner) land damages and interest, $13 9s. 1 22½ days work, £5 12s. 6d., exclusive of days charged for overseei work as commissioner; Michael Keiver, 16½ days work, besid charges for overseeing work as commissioner; Thomas W. Kinn 2 days work, besides charges as commissioner. There is then a nexed a number of notices of this assessment, addressed to differe persons, including one, as follows, to Joseph W. Turner:

"Take notice that the Commissioners of the Lake District did, on the 14th day December, A. D. 1866, make up bill of assessment upon the lands in said district: expenses, &c., from the 26th day of April, A. D. 1861, to the 14th day of Decemb A. D. 1866, and that the amount of $1,240 is assessed by them upon the lands leas by you by lease bearing date the 3rd day of March, A. D. 1863." * * *
"Bill of assessment is left with James Carnworth, clerk of said district, for inspecti Dated 17th day of December, A. D. 1866."

(Signed) JAMES CARNWORTH, *Clerk.*

"By order of the Commissioners."

This return having been filed and read, Mr. Palmer moved i Hilary Term, 1868, on behalf of Elisha P. Turner and Joseph W Turner, to quash the assesment on the following grounds:

1st. Because by the assessment it appears that a particular piec of land is assessed instead of the owner of the land.

2nd. If this is not clear it is uncertain what land or owner i assessed, or whether Joseph W. Turner or Elisha P. Turner or botl and if both, nothing to show what each has to pay.

3rd. That some of the commissioners, particularly Kinnie an Tingley, are interested in the work to be done and liable to asses ment, and therefore interested in the distribution of the assessmen and so not competent to be commissioners, and if commissioners, n warranted in acting in this case.

4th. That Michael Keiver, one of the commissioners, was materiall interested in the subject matter to be decided previously to orderin the assessment, he being interested in the contract, and the work f which money was assessed to pay and so could not make the asses ment. In Easter Term cause was shewn.

As to the first point, the bill of assessment under the head "Pr prietors' names" in all cases specifies the names of the parties assesse respectively, that is, the names of the owners of the land withou referring to the land itself, the number of acres being simply give

under the next head, "Number of acres," except in this now complained of, where, under the head of proprietors' names, is as follows:—"This land was let at public letting, on the 3rd day of March. A. D. 1863, to Joseph W. Turner, to satisfy assessment amounting to £286 2s. 9d, less £2 awarded for right of way, for expenses from 5th day of June, 1859, to 26th April, 1861, with other costs against Elisha P. Turner; but up to the date of this bill of assessment, lease to said Joseph W. Turner has not been recorded in the Registry Office of the County of Albert." The commissioners have no power to assess except that conferred upon them by section 10 of 22 Vict., cap. 53, which enacts that "the commissioners shall have all the general powers and authority conferred on commissioners of sewers by title "X" of the Revised Statutes, including the employment of workmen at reasonable wages, and the taxing and assessing of the owners of lands in said district, for defraying all expenses of said draining or dyking, having due regard to quantity or quality of land of each proprietor respectively, and benefits to be received, allowing for a difference of improvement in different lots according to locality with respect to flowage of tide-water or any other local benefits." The Revised Statutes title "X," cap. 67, referred to, authorizing the appointment of commissioners, authorizes them by section 2, to devise means and methods for erecting and repairing aboideaux, &c., for preventing inundation and for draining or drowning marshes, to employ workmen for reasonable wages, to tax and assess the owners of such lands for defraying the expenses thereof, having regard to the quantity and quality of land of each person and the benefits to be received as equally as they can. Both these statutes distinctly name the owners of the lands as the persons to be assessed, and give no power whatever to the commissioners to impose in the first instance any burthen or encumbrance on the land. After reading over carefully the entry in the bill of assessment, we are rather at a loss to understand what the commissioners really intended thereby. If the land was intended to be assessed, which is perhaps the most reasonable construction, this would be unwarranted by the Act and bad. If they did not intend to assess the land it is still more difficult to discover whom they did mean to assess, whether Joseph W. Turner or Elish P. Turner, or both. It was the duty of the assessors to ascertain and determine who was or were the owner or owners of the land liable to assessment, and directly, distinctly and unequivocally to assess by name the party liable. In this case this is not done, no parties are referred to at all, except by way of description with a view of identifying the land. Thus they describe the land as let to Joseph W. Turner to satisfy an assessment with other costs against Elisha P. Turner, and this is all the reference

to either of these parties. They do not say on what terms or i what time the land was leased, and whether at the time of the asse ment either of these parties had any interest in the land. Supp ing J. W. Turner or E. P. Turner, or either of them, to have be interested in this land at the time of the assessment, it would impossible, from this bill of assessment, to discover what that inter was, or to say who was the owner liable to assessment, or if both t parties named are liable, for how much each is liable. The not of the assessment is directed to Jos. W. Turner as if the comm sioners looked upon him as the party more immediately interest but the notice will not in any case help the assessment if bad on face; if it could, in this case it would operate directly the other w It does not profess to be given to J. W. Turner, as owner of the la as is the case with other names mentioned in the same notice, b on the contrary, it informs him that the amount of $1,240 is assess by the commissioners upon the lands leased to him by lease beari date the 1st March, 1863. For these reasons, on this ground, think the assessment is open to the objection taken, and is bad.

As to the second and third points, though the commissioners ha read and fyled no less than twenty-five affidavits, they have left t facts as set forth, by the applicant, bearing on the questions rais wholly unanswered and therefore admitted, and they have, by the return, confirmed the correctness of all such material particulars, f it must be remembered that we are not now called on to determi whether the commissioners acted fairly and properly either as com missioners or contractors and employers, or whether the assessmen is just or unjust in its distribution; the contention is that some c the commissioners being owners of land within the district wer necessarily directly interested in the work and assessment, and a contractors and employers with themselves and the other commi sioners, they were not competent to pass judgment on their ow work, audit and pass their own accounts, and assess the other pr prietors to pay any balance they so established to be due, and th being so incompetent to act, their proceedings were null and voi In shewing cause, not without some reason, great stress was laid c the fact that there had been already an adjudication on the ve point in controversy, and that until reversed by an Appellate Cou that decision was binding. It is no doubt generally most convenie and desirable to adhere strictly to the decisions of the Court on pronounced, leaving further discussion and reversal, if found wron to a higher tribunal, and this observation would be entitled to mo weight if such Appellate Court was practically accessible to t great body of suitors in this Province. But we can discover a arbitrary and inflexible rule requiring this in all cases. If the

were two conflicting decisions we should be bound to elect, or if any previous authority more, in our opinion, in accordance with the law had been accidently overlooked, or if the decision ignores, or is in our opinion inconsistent with, the right application of a clear and well-established and important principle, we think the case should give way to the principle, and this is no novel view, for we find constantly throughout the books cases explained, questioned, doubted, disapproved and overruled or not acted on, by others than Courts of Appellate Jurisdiction, and therefore, though we think a decision once deliberately declared should not be lightly disregarded or disturbed unless by Court of Appeal, except for cogent reason and upon a clear manifestation of error, there are occasions when we should be wrong to shut our ears or refuse our judgment, and this, we think, is one of those exceptioned cases. Entertaining the highest respect for the opinion of the very learned Judges by whom the case was formerly decided, but to which decision the learned Chief Justice was at the time constrained to refuse his judicial assent, we have felt it our duty most carefully to reconsider the case, and such further consideration has strengthened and confirmed the views then expressed by the learned Chief Justice. As his observations on that occasion have not been reported, we shall again read them as part of this our judgment.

"As I have, unfortunately, been unable to bring my mind to the conclusions arrived at by the rest of the Court on one point raised in this case, viz., as to the propriety of parties discharging the duties of commissioners in matters in which they are personally and pecuniarily interested, and as this involves, in my opinion, a principle of some magnitude, I feel it due to my honorable colleagues, as well as to myself, to state at length the reasons that constrain to a contrary conclusion.

"In determining whether the personal interest of the commissioners should preclude them from acting, the first question that naturally suggests itself is: what is the nature of the office and of the duties they are called upon to perform; if the office or the acts of the commissioners as such are of a judicial character, then must not prevail that fundamental principle in the administration of justice that no man shall be a judge in his own cause, and can it be set aside by any considerations of practical conveniences which may flow from their so acting? If the peculiar duties of such an office can be more beneficially discharged by interested persons, should not parties so situate be qualified by express enactment, and without such statutory qualification, and must not the principle of the common law be adhered to, notwithstanding its application may, in its practical working, operate inconveniently? The office of commis-

sioners of sewers has always been known to the English law; for, b the common law, the Crown used to grant commissions for inquirin into the want of reparations of sea walls, ditches, gutters, sewer &c.; but, in England, matters of this kind long since became reg lated by Acts of Parliament, the chief of which was the 23 He VIII., cap. 8, made perpetual by 3 and 4 Edw. VI., cap. 8, by whic it is enacted that commissions of sewers shall be directed to suc substantial and indifferent persons as shall be named by the Lo Chancellor, Treasurer, and two Chief Justices, or by three of ther whereof the Chancellor to be one: the form of the commission is the given, in which the commissioners are styled our Justices, who are t inquire by the oaths of honest and lawful men. By the 25 Hen. VII cap. 10, it is enacted that no person shall be compelled to act in th execution of any commission of sewers, unless he be dwelling withi the County whereof he is or shall be assigned to be commissioner and because divers persons theretofore assigned to be commissioner have refused to be sworn, whereby commissions remain withou effect in execution, a forfeiture is imposed upon persons so refusing shewing that commissioners had been appointed out of their ow counties, and that it was a situation, the duties of which partie reluctantly discharged. The commissioners so appointed are holde to be a Court of Record, and the commissioners are clearly judicia officers, and I can find no dictum or case in which it is hinted tha they can act in matters in which they are personally interested; an the Act clearly and expressly specifies that they shall be indifferen that is, disinterested persons, and it would seem, indeed, strange i interested parties could be judges, and the law so strict with refe ence to the jurors. We find in Rex v. Somerset Commissioner (7 East. 71), a presentment by a jury constituted as the ancient usag had been, was held illegal and void, because the jury were interestec In this Province, the first Acts regulating commissioners of sewe were the 26 Geo. III., cap. 45, and 34 Geo. III., cap. 8; these wer repealed by 10 and 11 Geo. IV., cap. 29, which, after reciting tha the Acts in force were ineffectual, enacted that on application of an proprietors of any marsh, the Governor might appoint, by commis sion, such able, discreet persons, as to him should seem meet to b commissioners of sewers, and such commissioners were authorize and empowered to convene and meet together from time to time, a occasion might require, to consult, consider and devise means an methods for building, &c., and to tax, &c., with an important pr vision that any person aggrieved by any proceeding of commis sioners, might appeal therefrom to the Supreme Court or Court c *Nisi Prius*. This Act was repealed by the Revised Statutes, an part 1st, title 10, cap. 67, substituted, in many respects containin

the same provisions, omitting, however, the clause granting an appeal. Cap. 68 of the Revised Statutes, makes provision for election of commissioners in Westmorland and Albert Counties. The first Act authorizing the draining of Germantown Lake, the special duty for for which the commissioners in this case were appointed, was the 19th Vict., cap. 26, which (here follows an abstract of the special provisions of these Acts). By a comparison of these Acts with the English Statutes it will be seen that, though the phraseology and the modes of proceeding are by no means the same, the duties to he performed under both are necessarily of a similar character, and the powers given to the commissioners in this Province are, in many respects, much greater than those in England, for, in a great variety of cases, where the commissioners here may themselves perform many things without the intervention of others, in England they can only act on an inquiry by the oaths of good and lawfnl men, and in the important matters of taxing and assessing, which the commissioners here have the jurisdiction within themselves to do; in England the commissionere have only authority on the presentment of a jury, without which the rate is utterly void, Wingate v. Waite, (6 M. & W. 739). So with respect to selling delinquent's lands; here the commissioners are empowered to issue their warrant to the sheriff, simply directing him to sell at public auction; but in England, when the commissioners for the like cause desire a sale of lands they must certify it into chancery and the royal assent he had. Are these commissioners, then, merely to be considered ministerial officers? What is to be understood by acts of a judicial as opposed to acts of a ministerial character? Are they not those acts by which any officer is by law authorized, either on evidence or view, or on information within his own knowledge, in the exercise of his discretion and judgment, to interfere with the property of, impose burthens on, and determine the rights of others, without their consent and against their will? I take it that it does not follow that the act is less judicial because the judge or party, by whatever name he may be called, may decide without holding a court, granting a hearing, examining witnesses, or without the intervention of a jury, or of any of those constitutional guards which protect suitors in the ordinary courts of justice. On the contrary, in such a case, there seems to me the greater reason why parties whose property and rights are to be affected by such an arbitrary tribunal, should have the benefit of the principle which secures him, at any rate, a disinterested, and so to be presumed an impartial one; and, in the case before us, are not the commissioners the sole judges of the matters to be done, the amount to be expended in doing them, and the persons who are to pay for what is done? That is, they

administer this law, and adjudicate upon the rights of all parties owning land within their jurisdiction, by determining how many canals shall be cut, not on any defined route, but at such places as they may deem most advisable, whose property shall be invaded, and without any consent of owners to appropriate so much of the same, not exceeding six rods in width for any one canal, as they may deem necessary; what dams or other obstructions, whosesoever the property may be, they shall be removed, and without limit or restriction to agree as to the amount of damage to lands or property arising from their acts, with power to tax all persons owning lands within their jurisdiction for the same, with all expenses of draining and ditching, and this by no fixed standard, but by having due regard to quantity and quality of land of each proprietor of land respectively, and benefits to be received, allowing for a difference of improvement in different lots, according to locality, with respect to flowage of tide-water or any other local benefits, and this without provision for any appeal; duties requiring the exercise of very nice discrimination, great discretion, and certainly the strictest impartiality, opposed, in every sense of the word, in my opinion, to mere ministerial acts, and duties, it seems to me, in view of the frailty of our common nature, scarcely possible for any man personally interested, as every proprietor must be, in each and every of these questions, however honest his intentions, satisfactorily to discharge. It occurs to me that if there ever was a matter affecting property in which a man would have a right to ask that he should have a disinterested impartial tribunal, it is when his land is to be taken, or what are considered improvements by others, forced on him without his consent and possibly against his will, and when he is called upon to pay, not for benefits received, but for those which, in the opinion of his judges, are to be received, not for tangible improvements, the value of which might be fixed by some reasonable certain scale, but for improvements according to locality with respect to flowage of tide-water or any other local benefits, matters necessarily largely of mere opinion, if not of almost mere speculation, and involving, as appears by the assessments in this case, in view of the general circumstances of the people of this country, such large investments for the improvement of comparatively valueless lands. To be debarred from such a tribunal, and to have his rights determined without appeal by co-proprietors, whose interests are to have their lands as little interfered with and injured and as much benefitted, and this at as small an expense as possible, and who are necessarily relieved just in proportion as the burthens are thrown on the other proprietors, creates in my mind no surprise that the result of the labors of the commissioners, however carefully and

estly performed, should be the subject of dissatisfaction and com-
nt. These duties, then, would seem to me to want all the ingre-
its of a ministerial, and to possess all the elements of a judicial
acter, and the inference from section 14, title 10, appears to me
how that the Legislature so considered them, by giving by ex-
s enactment the actions therein specified; for, if merely minis-
l officers, they would be liable for wilful neglect and gross
igence without any such provision, and there are in this Act
f provisions which render the position of a proprietor inconsistent
t wholly incompatible with that of a commissioner, shewing that
Legislature could never have contemplated the possibility of
ers being commissioners. Thus, in the event of the canal passing
ugh the lands of the commissioners, or the removal of obstruc-
s owned by commissioners, are they, as commissioners, to agree
theinselves as owners as to the amount they should receive?
o, there can be no doubt that, as between themselves, a very
factory valuation would be arrived at; but how far it would be
those who would have to pay would be much more question-
. It can, I think, hardly be supposed that the Legislature could
contemplated any thing so unreasonable. If they are not to
e with themselves there would seem to be no way in which the
unt they ought to receive could be estimated or fixed, as the
ion providing for an arbitration is only applicable to cases when
commissioners and owners cannot agree, and the following sec-
is again only applicable when, on such disagreement, either party
ses or fails to choose an arbitrator or the arbitration falls through
no other provisions are made. So in section 9, cap 7, title 10,
commissioners are to cause a just valuation by five disinterested
holders of the loss sustained by any land proprietors in conse-
nce of dyking, &c., thereby, I think, intending to establish a dis-
rested tribunal. It can scarcely have been the intention of the
islature that interested parties should nominate a disinterested
; on the other hand, I can find no provision from which any
rence can be drawn that it was the intention of the Legislature
owners might be commissioners, and I am unable to see any
logy to the case of assessors of Parish and County rates, which
been referred to; their duties being simply to assess an equal
as a poll tax, and a rate in just and equal proportions upon the
estate situate in the Parish, and on the personal estate and in-
es of the inhabitants thereof, the value of which, by section 20
the present law, each person may himself declare under oath, and
the value so declared he is to be rated, so that every man may
e himself his own assessor so far as the value of the property is
erned, and this is the only matter in which the slightest dis-

cretion is vested in the assessors. As to the case of elected commissioners, which has also been referred to. I do not see that any inference arises from the power given to certain sections to elect their own commissioners, one way or the other; if, on the one hand, an election was duly held, and no proprietor objected to a candidate proposed on the ground of his interest, it might not be open to him after he had entered on the duties of his office to question his qualification or right to act; if, on the other hand, a majority, having possibly some design of their own to carry out, or honestly, as the case might be, should, against the protest and wishes of the minority, elect one of themselves, the result might be very different. So a question might arise if a disinterested party was elected and he subsequently became interested; but it will be time enough to decide these questions when they arise; nor am I pressed with the consideration that the meeting which elects commissioners is a meeting of proprietors, at which the person to be elected, if disinterested, would not be present. This appears to me to offer no greater difficulty than the Governor and Council now have in appointing a person not present at the time of such appointment; and if it was a substantial difficulty, it would have the effect of actually preventing the proprietors from electing a disinterested person; but I can discover nothing in the Act which indicates that the proprietors are to be limited in their choice to certain of their own number. It appears to me, then, on the most careful consideration of this case that I can give it, that to permit parties interested to do the things contemplated by this Act, is directly opposed to the policy and well recognized and most important principle of the law, a principle so rigidly adhered to and carried so far as often to make a remote and trifling interest in the subject matter, operating to disqualify the Judge, most inconvenient; a principle that, I think, can only be overturned by express enactment or by a clear irresistible inference from the provisions of the Act constituting the jurisdiction, neither of which can I discover in this case. If in this case inconveniences result from the application of the principle, the Legislature alone can, in my opinion, give the remedy."

"Having this fundamental principle for my guide, I think no suggestions of policy should induce me to swerve from it, agreeing as I I do most fully, with the powerfully expressed opinion of Lord Abinger, in Adams *v.* Bankart (1 C. M. & R., 685), who says: 'I have always thought that policy is the last guide to which the Judges of the Courts of Law ought to resort. If, indeed, there be no decisions which can govern them and no principle which can lead them on their way, then, and then only, according to the light of their own imperfect mind, they must endeavor to discover and lay

down such rules as they conceive best adapted to promote the public good.'"

From these observations we desire to withdraw nothing and we have little to add. On the second point we only wish to refer to the case of Regina v. The Recorder and Borough of Camb. (4 Jur. N. S. 334) not cited, and to the case of Regina v. Warton (9 Jur. N. S. 325) since decided. The first of these cases was on an appeal against a poor rate at a borough quarter sessions. The rate was ordered to be amended with costs. At the next sessions the deputy recorder, who was a rate-payer in one of the parishes of the union, made an order which fixed the amount of the costs. Held, that the making of such an order was a judicial act, and consequently the order was void. Lord Campbell, who expressed himself as extremely sorry to come to the conclusion that the objection on the ground of interest must prevail, though there was no suggestion that the deputy recorder's judgment was in the remotest degree influenced by his interest, says: "He must be taken to have judicially decided on making an order for costs and therefore he was adjudicating his own," and Wightman, J., says: "It is clear beyond a reasonable doubt that the award of costs was the act of the deputy recorder, and it was a judical act; also the costs were payable out of a common fund, to which the parish, in which he was a rate-payer, contributed, and therefore he had an interest, however small, in the matter.

In Regina v. Warton (9 Jur. N. S. 325), decided 4th June, 1863, it was held under the 3 and 4 Wm. IV, cap. 22, sec. 13, that no order in respect of repairs could be made by commissioners of sewers upon a person who became owner of lands, subsequently to the date of the commission, and who, consequently, had not been presented by a jury as the person liable thereto. Presentment having been made of one Allan, as owner, under a commission of 1850, the order was made at a Court held 26th July, 1860, where it appeared, upon the evidence of the parish bailiff, that one Warton was the owner of certain marshes, late belonging to Allan, who had been so previously presented and had not traversed the presentment. We mention this case not because it is directly in point, for it is not contended that in this Province a presentment is necessary, but for the purpose of introducing certain observations of two of the learned Judges which bear on the general doctrine we are discussing. Compton, J., says: "The case of Wingate v. Wait (6 M. & W., 739) shews that the presentment of a jury is the foundation of the proceedings, and I take it that the question of ownership is also to be established by presentment. Now, in addition to the observations of the Lord Chief Justice as to the wording of the statute, we find that this course has been adopted from the earliest times. In the charge given by Callis,

App. 365, it is said the jury are to inquire of what lands are lying within reach of damage by any defects or defaults, and to whom they are belonging, and of the persons fit and proper to be charged to the repairs with the quantity and quality of their estates, so that all such persons may be charged and taxed in proportion to their rights and interests. This is not merely incidental to the mention of the lands, but is an essential part of the inquiry, because a party must have the right of traversing that which is in fact the basis and foundation of his liability, and it seems to me a monstrous state of things that, without any mode of disputing his liability or right to be heard upon the question, a party has to be brought in and an order made upon him to be carried out, if necessary, by fine and distress, in such case having had no opportunity of being heard, and traversing the finding of the jury made behind his back, he is to be told that if it should hereafter prove that the Justice in distraining had acted wrongfully, and without jurisdiction. he may have the meagre satisfaction of bringing an action. This is not the course of our law, which confers *prima facie* the right of answer, more particulaarly in those cases where the proceedings are *ex parte*. To this rule there are certainly exceptions, such as in the case of a finding of *fugam fecit* by a coroner's jury, which involved the forfeiture of land and goods; but these and other exceptions of the old law have always been viewed with reprobation. We are now asked to put the defendant in the same situation, and it is clear that could not have been done before the late statute. I cannot see what protection it is, or what answer it affords, to a person who disputes his liability and is desirous of traversing, to say: 'A was liable seven years ago and did not dispute his liability when he had the opportunity of doing so.' Some connection must be shewn between A and the person on whom the claim is made or nothing can be properly done. This is in accordance with the general rule of law that a party must have an opportunity of answering before his liability can be established, a rule which, unless qualified by the Legislature in this particular case, I, for one, should strongly uphold." And Blackburn, J., say: "The effect of the decision in Wingate v. Wait is that the presentment of a jury is the foundation of such proceedings as the present, and such presentment, it is clear, must be traversable, therefore, as a necessary preliminary to the attachment of any liability to repair, a presentment of the person on whom the liability is sought to be cast must be made. It would be unjust and hard in the extreme upon a person, if an *ex parte* order could be made finally upon him without giving him an opportunity of traversing, and that a presentment was necessary before the recent statute is, I think, clearly established."

It is the general rule of law that a party must have an opportunity of answering before his liability can be established, and it would be unjust and hard in the extreme upon a person that an *ex parte* order could be made finally upon him without giving him an opportunity of answering. Surely it would be contrary to all reason if that important rule is set aside, that we should ignore an equally important and clearly enunciated principle of our jurisprudence, that no one shall act as a judge upon an inquiry in which he is personally interested without a clear and explicit statutory declaration forcing us to do so. If such injustice and hardship is imposed on a party, ought we to deprive him likewise of the protection of an impartial tribunal? and this too where we have, as presented by the bill of assessment, the greatest diversity combined with almost infinitesimal distinctions of benefits assessed ranging from ten cents to $5.50 an acre. Without attempting to understand, on the one hand, by what process or principle an acre of land is ascertained to be benefitted to the extent of a few cents, or how it is possible to discriminate so nicely as to say, as is done, that seven acres are benefited ten cents an acre, or seven others just two cents an acre more, and three other acres just two cents an acre more than the last, and three other acres just two cents an acre more than this, and sixty acres $2.75 an acre, and thirty-eight acres just five cents an acre more, or without pretending to say, on the other hand, that this cannot be done or was not rightly done in the present case, we think such an extremely minute diversity of assessment and almost inappreciable amount of benefit, coupled with benefits in other instances put down at so large an amount as to make the assessmeut burthensome, justified the learned Chief Justice on the former occasion in saying, and fully justifies us now in repeating, that to adjust satisfactorily by an *ex parte* proceeding those fine conflicting interests, required not only great practical knowledge, but the very nicest discrimination and judgment of the most impartial and disinterested minds.

As to the third point raised, the present is certainly distinguishable from the former case in this, that here some of the commissioners who appear to have acted throughout were, independently of the general interest, resulting from their rights and liabilities as owners of land within the district, clearly, directly, and pecuniarily interested in the transactions of the commissioners themselves. The job involving by far the largest amount of work done and money expended, to reimburse which the present assessment was, to a great extent levied, was bid off by one Elijah Kinnie, a brother of one of the commissioners, who transferred to Michael Keiver, another of the commissioners, the whole job so bid off by him for £685. This

transfer is consented to by the commissioners by a writing signed by Agrean Tingley, Jr., the said Michael Keiver and Thomas W Kinnie, and in which they say they will direct their clerk to place to the credit of Michael Keiver on his book, £685. Again in August 1862, another job was put up by the commissioners and let to Agrean Tingley, one of themselves. On the 11th July, 1864, another job was put up and let to one William Tingley. This job, the commissioners state, was abandoned by Tingley and completed by Agrean Tingley, jr., a commissioner, for the amount at which it was let to William Tingley. In the general statement, among the land damages allowed and days works charged, independent of the time charged for by the commissioners, as commissioners, there are land damages and interest allowed Agrean Tingley, a commissioner, and exclusive of time charged for overseeing and attendance as commissioners, one day's work charged for each of the commissioners, Tingley, jr., Keiver and Kinnie, and allowed. Here we have commissioners contracting for themselves personally, on their own behalf and for their own benefit, with themselves officially, as commissioners, on behalf and for the benefit of the land owners; as commissioners fixing and agreeing with themselves as to land damages as against the other proprietors, to be paid to one of themselves, employing themselves individually as servants or day laborers to themselves officially, as commissioners; as commissioners passing judgment on their own work, as commissioners and employes; and, after deciding that they had fulfilled their contracts and done their work to their own satisfaction, and determining how much they shall, as commissioners, pay themselves as individuals, they finally adjudicate who shall pay them and what proportion each of those they declare liable shall pay, and some of themselves being of the number who are to pay, they fix what proportion they individually shall pay, and all this without the party now called upon to pay nearly one-third of the whole of this large expenditure for an alleged benefit, as he protests, forced on him against his will and without any opportunity of being heard in the matter, or any means of controlling the proceedings. All the difficulties the learned Chief Justice forsaw on the former occasion are more than realized on the present, and though the startling facts now presented were wanting, or at any rate did not appear, the *certiorari* having been refused and the proceeding not brought up, we cannot say that they present the matter to our minds on principle in a different light from what the learned Chief Justice then viewed it in, when he pointed out some of these anomalies as possible to arise if the principle of interested parties being allowed to act was sanctioned; but they illustrate, we think, so strongly the unsoundness of the former decision, that, for the reasons we have assigned,

and because, as said by Cockburn, C. J., in Regina v. Allen, (10 Jur. N. S. 796), "the principle that interested parties are incompetent to act is the essence of justice," we cannot, without the controlling force of an appellate tribunal, whose decisions are binding on this Court, feel ourselves warranted in affirming what we believe to be contrary to law and opposed to the first principles of justice, and which, if now established as a binding precedent to govern this case, must be hereafter followed in all similar and analogous cases. We are free to admit that this, by reason of the conflicting decisions, leaves the law in a very unsatisfactory state, and we shall be pleased to hear, if the legal advisers of the commissioners are dissatified with our views, that this judgment has become the subject of appeal, for furthering which this Court will grant every facility. But, under the circumstances, we think the burthen of initiating an appeal should not be cast on the party thus, in our opinion, entitled in law to our judgment. We therefore think we are bound to quash this assessment.

ALLEN, J.—This was an application to quash an assessment made upon certain lands in the County of Albert, known as the Lake District, under the Acts 19 Vict. c. 26, and 22 Vict. c. 53.

The objections to the assessment were—

1. That the assessment was upon the land, and not upon the owner of the land.

2. If this was not clear, that it was uncertain whether the assessment was on the land, or on the owner of the land; and whether it was upon Joseph W. Turner, or Elisha P. Turner, or on both; and if on both, that it was uncertain how much each was to pay.

3. That Thos. W. Kinnie and Agrean Tingley, two of the defendants, were interested in the work and liable to assessment, and therefore, not competent to be appointed commissioners, or to act.

4. That the defendant, Michael Keiver, was interested in the matter to be decided by the commissioners, and interested in a contract, and in work done under direction of the commissioners, and therefore incompetent to act.

One of the questions raised in this case, viz., whether persons interested in lands within the Lake District and liable to be assessed under the Act, can be appointed and act as commissioners, has been already expressly decided by a majority of this Court, in Calhoun's case, Hilary Term, 1863; and, so far as the point decided there is applicable to the present case, I feel bound by it, though, if the

question was now raised for the first time, I might, and probabl would, have come to a different conclusion. I do not understan the Court as deciding in that case, that though persons owning land in the district, and, therefore, liable to be assessed, are not disqual fied from being appointed commissioners; that they are necessaril qualified to perform all the duties pertaining to the office of com missioners. The following expressions in the judgment seem to shev this: The Court say: "Even if the commissioners, from interes were disqualified from performing some part of the duties of th office, they would be perfectly qualified to perform other duties." * * * "It is quite clear that if the interest of the commissioners is a legal disqualification for the performance of any particular act, th proceedings arising from that particular act may be set aside."

The Court held, in that case, that the commissioners were no judges; that the making an assessment was not a judicial act; anc that none of the duties assigned to them were judicial, or even *quas* judicial, and, therefore, the principle "that no man should be a judg in his own cause" did not apply. It is certainly true that most o the cases on the subject of persons acting in matters in which they are interested, are those of Justices sitting judicially in a Court; bu I can see no good reason why the application of the principle shoul be limited to cases of a strictly judicial character. With all defer ence to, and respect for, the opinions of the learned Judges wh decided that case, I think the commissioners were acting in a *quas* judicial character in making and apportioning the assessments, en tering into contracts for work, and examining and approving th work done under such contracts. Such acts as these, requiring dis cretion, skill and judgment, cannot be said to be mere *ministeria* acts. The foundation and principle of the rule contended for is, tha a man shall not act in the decision of a matter in which he has a interest. In Reg. v. Sheriff of Warwick (30 Law and Eq., R. 224 Lord Campbell says: "There is a principle of our jurisprudence, tha no one shall act as a Judge upon an inquiry in which he is personall interested; and it is of importance that that principle be strictly ad hered to." This is so fundamental a maxim, says Lord Coke, as no to be overruled by any prescription. Co. Lit. 141 *a*, Day v. Savag (Hob. 87).

If the term "Judge" is limited to a person holding a Court, or pre siding in a legal tribunal, then, probably, these commissioners canno be said to have been acting judicially; but I think it is not so limited and that it should rather be understood in the enlarged sense of any person acting in a matter where he is by law authorized, in the ex ercise of his judgment, to determine upon the rights and property o others. Reason and justice, and the importance of having an impar

ial tribunal to determine the various questions which these commissioners have to decide, as much require that they should be disinterested, as it does that a Justice of the Peace or a Sheriff should be free from interest in a matter which is brought before a tribunal over which he presides, or of which he is a member. I do not find that the cases confine the exclusion to persons holding courts. In Reg. v. the Great Western Railway Company (13 Q. B., 327) an audit of accounts, by a person who was interested in the amount, was quashed, the Court saying that on well-known principles no auditor could settle his own accounts. So, in Reg. v. Rand (Law R., 1 Q. B. 230) where a corporation were owners of water-works, and were empowered by statute to take the water of certain streams, without permission of the mill-owners thereon, on obtaining the certificate of two justices that a certain reservoir was completed, of a given capacity, and filled with water, it was held that the granting the certificate by the justices was a judicial act. It does not appear in what manner the justices were authorized by the act in making the inquiry, though it is stated in the judgment that they heard evidence in the matter, which may be the reason why their certificate was a judicial act. Unless this is the case, it is difficult to see why the determining the size and completion of a reservoir was more of a judicial proceeding than the acts of these commissioners in determining the mode of draining the lake and marsh lands; the quantity of land necessary to be appropriated for that purpose; the necessary contracts and securities to be entered into for the performance of the work; the amount of damages to be paid to the owners of lands through which any canal may be required to be cut; and the taxing and assessing the owners of lands in the district for defraying the expenses. Can it be said that these are merely ministerial acts? The commissioners are also required to appoint a collector to collect the assessments which they order, and they are empowered to call the collector before them to account. 1 Rev. Stat., c. 67, § 4. This, surely, must be a judicial proceeding; and it shews the necessity of the commissioners being impartial and free from interest.

It has been argued that the words "disinterested free-holders," used in the Act 22 Vict., c. 53, § 6, providing for a jury to assess the damages when the commissioners cannot agree with the owners of the land, shews that it was not intended that the commissioners should be disqualified by interest according to the maxim *expressio unius est exclusio alterius;* but I think these words are only used *ex abundanti cautela*, and express no more than the law would imply without them. Wakefield Board of Health v. Grimsby Railway Company (12 Jur. N. S. 160; 6 B. and S., 794).

Having made these observations on the general principle, I will

now briefly consider the question of Keiver's interest as a co with the commissioners. Admitting that, according to the in Calhoun's case, the interest of the commissioners did not d them from making the assessment, I think that Keiver wa disqualified from acting, in consequence of the contract w transferred to him by Elijah Kinnie, the work being perfo Keiver, and he afterwards, as one of the commissioners, adju upon and approving of it, or, in the words of the Act, decid the work had been faithfully and satisfactorily perform thereby directly voting money into his own pocket; and, involving his taking part in the settlement of his own acc was said in Reg. v. The Great Western Railway Company (327). I think, also, that the assessment was improperly ma the land. It should have been upon Turner, as the owne land. The 10th Sect. of the Act 22 Vict., c. 53, gives the sioners the powers "of taxing and assessing the owners of said district, for defraying all expenses of draining," &c.; an 67 of the Revised Statutes "of sewers," the general prov which are incorporated in this Act, the commissioners are au to assess the *owners* of lands, for defraying the expense of &c., and the collector appointed to collect the assessment is ized to distrain upon the property of all persons neglecting There can be no neglect to pay if a person has never been

On these two grounds, viz., the interest of Keiver in the and the assessment being upon the land and not upon the it, I think the assessment must be quashed. On the genera as to the disqualification of the commissioners, Kinnie and by reason of their owning land in the district, and there liable to be assessed, I feel myself bound by the former holding that it is not such an interest as will prevent th acting.

REGINA *v.* STEADMAN.

In re STEVENS.

FEBRUARY

The affidavits upon which a warrant under the Absconding Debtor's Act may be sworn before the attorney of the petitioning creditor.

Where a debtor was a resident of the State of Maine, but did business in th and went away for the purpose of defrauding his creditors. Held, Tha be proceeded against under the Absconding Debtor's Act.

H. B. Rainsford, in Michaelmas Term last, moved to c order made by James Steadman, Esq., a Judge of the Count

for a *supersedeas* of a warrant granted under the Absconding Debtor's Act against the property of Shephard S. Stevens. The *supersedeas* had been granted on the grounds: 1. That the affidavits of the petitioning creditor and witnesses, upon which the warrant was issued, were sworn before Mr. Edgar, one of the attorneys for the petitioning creditor, by whom the warrant was obtained. 2. That Stevens was not before or at the time of the issuing of the warrant a resident of this Province, but was a resident of Houlton, in the State of Maine. It appeared that Stevens, although residing at Houlton, had been doing buisiness for some years at Richmond Station, in this Province, and had given up his business there and gone to Chicago. It was set forth in the affidavits upon which the warrant was obtained that he had done so to avoid payment of his debts. A rule *nisi* having been granted,

C. H. B. Fisher shewed cause. The party here was not a resident of this Province, and cannot therefore become an absconding debtor, the debt being contracted in the United States and the creditor a resident of that country. [RITCHIE, C. J.: Where do you find it laid down that to become an absconding debtor a party must be a resident?] I think that under the Act residence is required, and in this case there was no concealment; every one knew he was going to Chicago. The affidavit of the petitioning creditor was sworn before his own attorney, [RITCHIE, C. J.: That was proper enough, the rule which excludes affidavits sworn before the attorney of a party only applies to proceedings in Court, after commencement of a suit.]

H. B. Rainsford, contra. The objection in regard to the creditor being a resident of the United States was not taken before the County Court Judge, and cannot avail here. The party had been doing business in the Province for four or five years and absconded from it, and these proceedings were taken for a debt incurred out of it. 1 Rev. Stat. 318, § 20, enacts that a creditor residing out of the Province shall have all the benefits of the Act. I contend that for the purposes of the Act he was a resident, and that under § 20 he might be proceeded against.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

This was an application to quash an order made by James Steadman, Esq., a Judge of the County Court, for a *supersedeas* of a warrant granted under the Absconding Debtor's Act, (1 Rev. Stat., c. 125), against the property of Shephard S. Stevens. The grounds

upon which the *supersedeas* was granted were: 1st. That davits of the petitioning creditor were sworn before Mr. E of the attorneys for the petitioning creditor, by whom the was obtained. 2d. That Stevens was not, before or at th issuing the warrant a resident in this Province, but was a of Houlton, in the State of Maine.

The first ground was disposed of during the argument. which excludes affidavits sworn before the attorney of a p plies only to proceedings in Court where a suit has been con This is not a proceeding in the Supreme Court, and at the affidavits were sworn the matter under the Act was not ev ing, the affidavits being only a preliminary step to obtai warrant, and in that respect resembling an affidavit to hol which may be sworn before the attorney who afterwards i writ.

Secondly. We think this case comes within the Act. Th on which the *supersedeas* was granted by the Judge of th Court was that Stevens was not a resident of this Provin admitted that he owned property and carried on busines Province, at Richmond Station, and was their almost daily his residence was at Houlton, about four miles distant. necessary that a person should be a resident in the Province to subject himself to be proceeded against under this Act. has no locality, and a creditor has a right to proceed ag debtor for the recovery of his demand wherever he may b It is not contrary to either the words or the spirit of the Ac that a person indebted and being in the Province, though a temporary purpose, may be proceeded against as an ab debtor, if it is made to appear that such a person "*departs* keeps concealed within the Province with intent to defraud l tors "or to avoid being arrested by process of law." We th no ground for superseding a warrant issued against his under the Act to shew that he was not a resident in the l The affidavits on which the warrant was granted in this think, did shew that Stevens *departed from* the Province intent mentioned in the act, and that the facts proved by his application for a *supersedeas*, disclosed no answer to the ings on the part of the creditor.

It was objected on the argument that as the creditor r Boston, and the debt was contracted in the United States, could not become an absconding debtor by his act of going Province into the United States. As no such point was tak the Judge of the County Court on the argument for the *sup* nor before the Judge of this Court, who granted the *certi*

remove the proceedings, it cannot be entertained, nor, as this is in the nature of an appeal and not a re-hearing, and therefore the parties must be confined to the points, taken before the Judge of the County Court. See Caton v. Caton (Law R. 2 H. Lords, c. 144). We do not wish, however, to be understood as assenting to the position that a party who departs from the Province, to avoid being arrested by process issued by his creditors residing in a foreign country, cannot be an absconding debtor within the Act, because he goes to the country where his creditor resides.

The rule will be made absolute to quash the order for the *supersedeas* of the warrant, and to restore to the debtor the property seized and attached under such warrant.

REGINA v. MCINTOSH.

FEBRUARY 5, 1869.

Perjury cannot be assigned upon an affidavit taken before a commissioner, who had no authority to take the affidavit.

The meaning of the definition of perjury in 1 Rev. Stat. c. 161, § 30—is that perjury can only be assigned for false swearing, before an officer authorized to administer an oath, in the particular proceeding in which the witness was sworn.

This was a case stated for the opinion of the Court from the County Court of Gloucester, where the defendant was tried, on an indictment for perjury, and found guilty. The Judge's statement of the case sets forth that perjury was assigned on an affidavit made by the prisoner, in a review case tried before a Justice of the Peace, in the service of an order for the hearing of the cause before the Judge who granted the order. The affidavit was sworn before James G. C. Blackhall, Esq., a commissioner for taking affidavits to be read in theSupreme Court. The order and affidavit of service are in the following words, viz:—

John McIntosh v. Paulin.—Tried before Robert Nixon, Esq., one of the Justices of the Peace, in and for the County of Gloucester, at Caraquet, in the said County, on Friday, the third day of January, A. D. 1868. The Justice's report of the evidence, cause of action, grounds of defence, and judgment in this cause, having been laid before me with the affidavit of John McIntosh, and it appearing to me that substantial justice has not been done to the said John McIntosh, I appoint the 15th day of February next, at 11 o'clock in the forenoon, at my office, in Newcastle, in the County of Northum-

berland, as the time and place for hearing the parties on r
Dated the 31st day of January, 1868.

EDWARD WILLISTON, J. C

Justices Court, on Review.

John McIntosh, plaintiff, *v Paulin*, defendant.

William A. McIntosh, of Caraquet, in the County of Glou
farmer, maketh oath and saith that he this deponent, did, on th
day of February inst, personally serve Paulin, the above
defendant, with the order hereto annexed, by shewing the s
him, and at the same time delivering to him a true copy there

Sworn to at Caraquet, aforesaid, this 10th day of February, A. D. 1868, before me, J. G. C. Blackhall, a commissioner for taking affidavits in the Supreme Court. } WILLIAM A. McINT

All the introductory averments being proved, J. G. C. Bla
Esq., being sworn, testified that he was a commissioner for
affidavits to be read in the Supreme Court, received a commis
1857 or 1858, and has since acted in that capacity. That th
davit produced was signed by and sworn to by the prisoner, to
affidavit was attached an order for hearing on review, whi
marked at the time, and identified as those produced. It w
jected to by Mr. End for the prisoner: 1st. That the Act 31st
10, intituled an Act to establish County Courts, gave no autho
commissioners for taking affidavits to be read in the Supreme
to administer oaths in proceedings under that Act, except in aff
to hold to bail, by § 13, That the affidavit was sworn to on
February, 1868, before the Act 31 Vict., c. 13, an Act to ame
Act to establish County Courts, was passed, which was on th
March, 1868, in which latter Act, by § 2, express authority is
to such commissioner to take affidavits to be read in the C
Court. 2nd. That the affidavit was not entitled in any Cou
the affidavit being made without any legal competent autho
perjury could be assigned. The County Court Judge had do
to the first point, but admitted the evidence, reserving the poi
the consideration of the Court. The case was then left to th
and the prisoner found guilty. The opinion of the Court is req
1. Whether the affidavit sworn to before a commissioner for
affidavits to be read in the Supreme Court, was properly rece
evidence. 2. Whether the affidavit was properly entitled, and

ther perjury could be assigned npon it. The points were argued in Michaelmas Term last.

Needham against the conviction. The 2nd Rev. Stat. 389, shews that before the passing of that Act, the commissioners for taking affidavits to be read in the Supreme Court had no power to take affidavits in the Court of Common Pleas. The County Court Act abolished the latter Court, leaving the power of the commissioners just what it was before the 2nd Rev. Stat. 389, as regards taking affidavits. The only section in the County Court Act, which refers to these commissioners, is § 13, and that gives them no authority to take such an affidavit as this. There is no authority under the Act to make an affidavit of service at all. The Act 31 Vict., cap. 13, under which they claim the commissioners had a right to take the affidavit, was not passed until after the affidavit was made. I contend that the affidavit of service was not required, had no right to be taken, that it is an extra judicial proceeding, and one on which perjury cannot be assigned. If the law does not authorize such an affidavit to be made, it is just as if none had been made, and there is no perjury.

Wetmore, Attorney General, contra. The point taken here does not arise in the case at all, and cannot, therefore, be adjudicated on, even were there any thing in it. The only questions sent down are the two stated in the case. 1. That the Act of 1867 gave no authority to commissioners to take affidavits in the County Court, except affidavits to hold to bail, and that this affidavit was taken before the amended Act was passed, which gave such authority. 2. That the affidavit was not entitled in any Court. [ALLEN, J.: This affidavit ought not to be entitled in any Court.] As to the last point, Rex. *v.* Hailey, (Ry. & Moo.), cap. 94, shews that even if an affidavit is entitled wrong, or if, by reason of certain omissions in the jurat, it cannot be received in evidence; yet, if it is false, the party may be indicted for perjury on it, for the perjury is complete at the time of the swearing. As to the first point, the intention of the County Court Act was clearly to confer on the County Courts the same power, and furnish them with the same means of proceeding in review cases enjoyed by the Supreme Court, see § 18 and § 36. And 1 Rev. Stat., p. 464, enacts that false swearing before any officer authorized to administer an oath shall make the party guilty of perjury.

Needham in reply. *Cur. adv. vult.*

RITCHIE, C, J., now delivered the judgment of the Court.

The affidavit on which the perjury was assigned in this case was made before a commissioner authorized to take affidavits in the Supreme Court. The power of such commissioners is derived from the Stat. 29, Car. 2, cap. 5, which authorizes the Courts of King's Bench, Common Pleas, and Exchequer, to issue commissions empowering persons to take affidavits of persons "in or concerning any cause, matter, or thing, depending or hereafter to be depending, or anywise concerning any proceedings to be in the said respective Courts, as Masters of Chancery, in extraordinary, do use to do."

The provisions of this Statute were adopted in this Province by the Act 3 Vict., cap. 51, though prior to that the Supreme Court had been in the habit of issuing such commissions. These commissions authorize the taking of affidavits concerning causes or matters depending in, or relating to, the proceedings of the Supreme Court. The Act providing for the review of causes tried in Justice's Courts (1 Rev. Stat., cap. 137, § 44) gives no authority to commissioners appointed by the Supreme Court to administer oaths in matters of review, which, even if the order for review is granted by a Judge of the Supreme Court, is not a proceeding in that Court, but a statutory power given to the Judge, quite independent of the Court. So with reference to an order granted by a Judge of the County Court. But, if the proceeding was in the County Court, the Act 30 Vict., cap. 10, establishing those Courts, only permits commissioners, authorized to take affidavits in the Supreme Court, to take affidavits to hold to bail; and to remedy the inconvenience arising from this limited authority, the Act 31 Vict., cap. 13, was passed, authorizing all affidavits to be used in the said Courts or before any Judge thereof, to be sworn before any such Judge, a Judge of the Supreme Court, or any commissioner appointed to take affidavits to be read in the Supreme Court. The affidavit in this case was sworn on the 10th February, 1868, before the passing of this last Act.

In Rex. v. Hanks (3 C. & P. 419) it was held that a witness sworn before a commissioner for taking affidavits in the King's Bench, and examined *viva voce* before an arbitrator in a cause referred by order of a Judge of the Court, was not liable to be indicted for perjury, as the commissioner was only authorized to take affidavits, and not to administer an oath for a *viva voce* examination. In Reg. v. Hallett (2 Deu. C. C. 237) false swearing before an arbitrator appointed under the County Court Act, was held not to be perjury, because the Act gave no power to an arbitrator, so appointed, to administer an oath. And in Reg. v. Stowe (22 Law and Eq. R. 593, 17 Jur 1106) it was held that a Master extraordinary in Chancery had no authority to administer an oath in matters before the Court of Admiralty, and that perjury could not be assigned on an oath so admin-

istered, though it was the practice of the Court of Admiralty to receive affidavits sworn in that manner. In Blakeley v. Abeles (11 Jur. N. S. 325) it was held that an affidavit could not be read, unless it was sworn before a commissioner of the Court in which it is intended to be used.

It was contended in the present case that the conviction could be sustained under the 1 Rev. Stat. c. 161, § 30, which enacts that "False swearing, in any case of taking an oath in any Court of Justice, or before any officer authorized to administer an oath, shall make the party offending guilty of perjury." This enactment does not get over the difficulty, because the words "*officer authorized*" &c., must mean an officer authorized to administer an oath in the particular proceeding in which the witness was sworn, and not every officer who may have power to administer an oath in any matter. If it was so the affidavit might have been sworn before the Judge of the Court of Admiralty, or of a Probate Court, or before an arbitrator under the Act 19 Vict., cap. 41, § 10, and perjury could have been assigned upon it.

As Mr. Blackhall, who took the affidavit in this case, was only authorized by his commission to take affidavits concerning any cause, matter, or thing depending in, or concerning any of the proceedings of, the Supreme Court, and the proceedings in which this affidavit was taken was not a cause depending in or relating to any proceeding of the Supreme Court, the false swearing does not amount to perjury, and, therefore, the conviction cannot be sustained.

Conviction quashed.

MILLER *v.* WELDON.

FEBRUARY 15th, 869.

Defendant moved for judgment as in case of a nonsuit against the plaintiff for not proceeding to trial pursuant to a peremptory undertaking. It was discovered that no entry had been filed in the Clerk's office, and that the only paper in the cause on file was the notice of appearance. Held, That the cause was not in Court, and no judgment could be given.

A. L. Palmer, Q. C., in Michaelmas Term last, moved for judgment, as in case of a nonsuit against the plaintiff, for not proceeding to trial pursuant to a peremptory undertaking. On reference to the Clerk of the Pleas it was found that the case had never been entered in his office, and that no paper of any kind in the cause had been filed there by the plaintiff, the only paper on file being the copy of the defendant's notice of appearance. He contended that it was in

the power of the Court to give judgment as in case of a nonsuit, even if the case was not in Court, and that it was analogous to judgment of *non pros.* [ALLEN, J.: Can you find any case where judgment of *non pros* has been given without the cause being entered?] If the plaintiff has done nothing the defendant is entitled to judgment of *non pros*, and if that judgment can be given the plaintiff may be nonsuited for not going to trial even where there is no entry. [RITCHIE, C. J.: I differ from you entirely in regard to the practice in *non pros;* there is no *non pros* without an entry. If entered and no declaration in two terms, he is *non prossed;* if he does not declare in four terms he is out of Court.] In justice at least the defendant is entitled to judgment, or he will lose his costs. [RITCHIE, C. J.: No, for you should have made search, you are paid for doing so.] It is clear that within a year the plaintiff is entitled to file an entry *nunc pro tunc* under a Judge's order. Is the defendant to go on searching continually, or how often is he to search? and if he enters an appearance without seeing that there is an entry on file he loses his costs.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

A motion was made in Michaelmas Term, 30th Vict., for judgment as in case of a nonsuit, and upon showing cause the defendant peremptorily undertook to bring the cause on to be tried at the then next assizes to be holden for the County of Gloucester, and a rule was made accordingly. Plaintiff did not proceed to trial pursuant to such undertaking, though it is alleged plaintiff gave notice of trial. Mr. Palmer now moves for judgment. On reference to the clerk he reports that this cause was never entered in the clerk's office, that the plaintiff has never filed a paper there, and that the only document on file in reference to it is a copy of the notice of appearance by defendant's attorney. Under such circumstances it is manifestly clear that we can give no judgment as prayed, and to allow a judgment to be signed in a case not properly entered would not only be in direct defiance of a rule of Court, but this cause was never entered, and when a cause has not been duly entered it has already been decided that there is no cause in Court. If there is no cause in Court it is quite impossible for us to give judgment, as there is no person before the Court against whom a judgment can be signed, and there are no documents or proceedings whatever on the files of the Court on which judgment could be given, and we certainly cannot give judgment against a person for not proceeding in a cause, when there is no cause in Court in which he could legally and properly

proceed. This is analogous to the case of a plaintiff who does not declare within a year, in which case judgment of *non pros* cannot be signed because plaintiff is out of Court. See Cooper *v.* ——— (3 B. & Al. 271).

The rule of Easter Term, 25 Geo. III, requires every attorney to enter the return and file the writ or process in all actions which have not been agreed, and in which they intend to proceed and make a docket of all such returns and rules, and deliver the same to the clerk of the Court, and by a rule of Hilary term, 7 Wm. IV, this rule is re-enacted, requiring a docket of all such returns and rules to be made and filed with the clerk on or before the last return day of the term at which such writs are returnable, or within thirty days thereafter, and the clerk is thereby prohibited from receiving or filing any dockets or entering any such rule after the said thirty days without the special order of the Court or a Judge, to be made on affidavit or affidavits properly accounting for the delay. And by rule of Easter Term, 11th Vict., no judgment, interlocutory or final, is to be signed in any cause until it be ascertained after search that the cause has been duly entered. In Muldoon *v.* Beveridge (2 Kerr 532), Chipman, C. J., says: "In this case the original action not having been entered, and no docket of it filed, pursuant to the rules of this Court, it must be considered in the same light as a case where under the general practice the plaintiff omits to declare in due time, and the cause must be deemed out of Court." In McAuley *v.* Geddes (4 Allen 591), a motion was made for leave to file the entry docket and declaration. The writ was returnable in Trinity, 1857, the defendant appeared, the cause was tried, a verdict for plaintiff, which verdict was affirmed. It was afterwards discovered that the cause had not been entered. The affidavit of plaintiff's attorney stated that the omission arose from an oversight, and not from any intention to violate the rules of the Court. The Court refused the application, the Chief Justice saying it would be encouraging a loose and improper practice if the application was granted, and Parker, J., was of opinion that the clerk acted properly in refusing to sign the judgment.

Motion refused.*

*Weldon, J., took no part.

GILPIN *v.* SCOVIL and others.

FEBRUARY 5th, 1869.

C. (plaintiff's mother) and M., daughters of S., were entitled to certain real estate in right of their mother, who died in 1826. S. married again, and subsequently in 1841, made a will whereby he provided that C. and M. should each receive £1,000 on their marriage, and that when his youngest son became of age, an equal share with his other children, of his property should be invested for their benefit; after the death of either, her share to be divided amongst her children, the child to represent the parent in any division of property: no share to be deemed to have vested until paid, with the proviso that C. and M. should not be entitled to any benefit under his will unless they ratified his acts relative to their mother's real estate. In 1844, by deed in consideration of the legacies and provisions made for them by the last will and testament of S., they conveyed to him their real estate. C. married in 1847, and died in 1851. In 1852 S. revoked the provisions in his will in favor of C., bequeathing the plaintiff £1,000 on his coming of age. In 1858 S. died

Held—1. That S. could not revoke the provisions in favor of his daughters in his first will, and that the transaction was a contract capable of being enforced in equity.

2. That there was a sufficiently signed contract to satisfy the Statute of Frauds.

3. That the fact of C. having received certain advances from S., after her marriage, was no proof to establish a substituted contract.

4. That during coverture C. could not enter into a contract to abandon the rights she acquired under the will of S.

5. That the provisions in the will for the benefit of C. inured for the benefit of the plaintiff her son.

6. That the plaintiff's infancy was no bar to his enforcing the contract, as he was entitled during infancy to the interest of his mother's share.

7. That in equity a party who intends to rely on the Statute of Frauds must specially plead it or raise the objection in his answer.

8. That under 17 Vict., cap. 18, it was not necessary for M. to be a party to the suit.

This was an appeal from the judgment of ALLEN, J., delivered at the Equity Sittings in June 1868. The judgment appealed from sets out at length all the material facts of the case and is as follows:—

The bill in this case was filed for the purpose of obtaining a declaration of certain trusts alleged to have been created in the plaintiff's favor under an instrument executed by the late Benjamin Smith, as his last will and testament, and for ascertaining and determining the plaintiff's rights thereunder, and that a subsequent will and codicil of Benjamin Smith, so far as they alter or revoke the said alleged trusts, may be declared to be fraudulent and void.

The plaintiff, who is a minor, is the only child of Charlotte Gilpin, a daughter of Benjamin Smith; she married John Bernard Gilpin of Halifax, N. S., in August, 1846, and died on the 3rd March, 1851. Benjamin Smith died 8th July, 1858, and the defendants are his executors and trustees. Charlotte Gilpin and Martha Jane Ruel were the only children of Benjamin Smith by his first wife, and they were entitled to certain real estate in St. John, as heirs of their mother, Jane Canby, who died in 1826.

On the 11th September, 1841, after his second marriage, Benjamin Smith duly executed, as and for a will, a writing whereby he gave and devised to the defendant Scovil, and three others, all his real and personal estate in trust, to allow his wife to occupy his dwelling house in Digby, N. S., for her life, and to pay her a certain annuity; also to pay to each of his daughters, Charlotte and Martha Jane, the sum of £1,000 on their respective marriages; provided that they should not be entitled thereto, or to any other benefits thereinafter provided for them, unless they confirmed and ratified by all necessary and legal means, all his acts and agreements relative to their mother's real estate, and should also convey to the uses of his said will all their rights and interest in such part of the said estate as still remained in his possession. He then gave legacies to his children by the second marriage, (at that time a son and a daughter); and directed his trustees to continue to manage the estate till his son Peleg Wiswell was twenty-one years of age, or if he should have any other son or sons, till his youngest son was twenty-one years of age, when, if his wife should not be living, he directed them to dispose of all his real and personal estate and divide the proceeds equally among his children, in the following manner: To pay to his sons their shares absolutely, but to invest the shares of his daughters, and pay the annual proceeds to them respectively during their lives; after the death of any daughter, her share to be equally divided among her children; the share of each son to be paid at the age of twenty-one years, and the share of each daughter on her marriage or at the age of eighteen, which ever shall first happen, and each child to be entitled to the annual income of its respective share until the principal was paid. That if either of his daughters should die without leaving any child, her share should be equally divided among his other children, and should form a part of their respective shares, and should be paid as hereinbefore provided with regard to the shares of his sons and daughters respectively. That if any of his children should die, leaving a child or children, such child or children should represent the parent in any division of property, which might thereafter take place according to the provisions of the will, the share of such parent being equally divided among such children (if more than one); the share of each son to be paid at the age of twenty-one years, and the share of each daughter at the age of eighteen, or on her marriage, and each child to be entitled to the annual income of its respective share until the principal was paid. After directing that in the division of the property any of his children who had received the £1,000 should have that sum deducted from their shares, in order that the sums paid to each of his children should be equal; and giving some further directions to the trustees,

the will proceeds:—"And I further will and direct that in the con-
"struction of this my will, no sum of money which I have herein
"directed to be paid to any child or grandchild at the age of twenty-
"one years, or at the age of eighteen years, or on being married,
"shall be deemed to have vested or to have become a vested interest
"in such child or grandchild, until the time of payment shall have
"arrived, and if such child or grandchild shall die before the time of
"payment shall have arrived, then such sum of money or legacy shall
"lapse, and shall be disposed of by my said trustees under the pro-
"visions of this my will, in the same manner as if such child or
"grandchild had never existed."

He afterwards executed several codicils to this will, two of which, as they have been referred to during the argument, and may have some bearing on the case, I shall quote.—By a codicil dated 22nd September, 1848, he states: "And whereas, in and by a clause of my
"said will, provision has been made for the payment of the sum of
"£1,000 on the marriage of each of my daughters, Charlotte and
"Martha Jane, who have since become married, and who also have
"been and still will be to some extent assisted by me; it is my will
"and I do hereby direct that in lieu of the said sums of £1,000 to
"them respectively, no charges appearing upon my books against
"them shall be taken into account in setting off their shares under
"the provisions of my will, as allowable deductions from their shares
"respectively, excepting such sums as shall exceed the sum of £500,
"to each of them, which excess shall alone be carried into account
"against them by my trustees." He then directed that in case his wife should decline to accept the provision made for her by his will, his trustees should pay her what she was entitled to by law, and that after her death the remainder of his property should be distributed among his children, share and share alike, upon his youngest son's attaining twenty-one years of age, in the manner provided by his will.

In another codicil, dated 23rd November, 1852, after stating that his daughter Charlotte had died leaving a son William S. Gilpin, her surviving, the testator revoked all the bequests and provisions made for his said daughter and her children by his will, and directed his trustees to pay William S. Gilpin £500, when he attained twenty-one years of age. He also revoked the bequest and provision made for his daughter Martha Jane by the will, and directed the trustees to pay her an annuity of £50 for life, and to pay to each of her children £400, on attaining twenty-one years of age, or to the issue of any child dying under that age; and declared as follows: "Pro-
"vided that the provisions in this my codicil contained for the annual
"payment of £50 to my said daughter Martha June, and the sai

"provision for her children respectively, are to be upon condition "that no dispute or claim be made against my estate or my execu-"tors by my said daughter Martha Jane, or her present or any future "husband, for or on account of any real estate or other property left "by the mother of my said daughter Martha Jane, or for or in "respect of any of my acts or agreements relative thereto, I having "fully settled and accounted for the same."

On the 18th October, 1844, Charlotte Smith and Martha Jane Smith executed a deed in the following words: "This indenture, made "the 18th day of October, 1844, between Charlotte Smith and Martha "Jane Smith, both of Digby, in the Province of Nova Scotia, spin-"sters, of the one part, and Benjamin Smith of the city of St. John, "in the Province of New Brunswick, of the other part, witnesseth, "that the said Charlotte Smith and Martha Jane Smith, for and in "consideration of the legacies and provisions made for them by the "last will and testament of the said Benjamin Smith, their father, "and also for and in consideration of the sum of five shillings law-"ful money, &c., to them paid by the said Benjamin Smith, at or "before the sealing and delivery of these presents, &c., have, and "each of them hath granted, bargained and sold, and by these pres-"ents doth grant, bargain, and sell unto the said Benjamin Smith, "his heirs and assigns, all the right, title, interest, property, claim, "and demand of them the said Charlotte Smith and Martha Jane "Smith, of, in, to or out of the undivided share or portion of the "real estate of the late Thomas Canby, deceased, as legal represen-"tatives of their late mother, Jane Smith, who was one of the "daughters and heirs-at-law of the said Thomas Canby, which said "real estate consists of two lots of land, &c. *(here follows the descrip-"tion)* to have and to hold the said right, title, interest, property, "claim, and demand of them, the said Charlotte Smith and Martha "Jane Smith, or either of them, in, to and out of the premises afore-"said, unto the said Benjamin Smith, his heirs and assigns, and to "his and their only use and behoof forever. In witness," &c.

This deed was acknowledged on the following day, and registered on the 8th November following.

On the 10th October, 1856, Benjamin Smith made and executed another will, whereby he revoked his former will and all codicils, and devised and bequeathed all his property, real and personal, to the defendants in trust, to pay his wife and his daughter, Martha Jane Ruel, certain annuities for life, and certain annual sums to his other children, till the youngest was of age, and to pay to his grand-son, William S. Gilpin (the plaintiff), £1,000 on his attaining the age of twenty-one years, or to his lawful issue, if he died under that age leaving issue; and when the testator's youngest child attained

twenty-one years of age to divide all the remainder of his est between his sons, Peleg Wiswell Smith and Benjamin Smith, and daughter, Elizabeth Gilpin Smith, share and share alike, and pay annual produce and interest of the respective shares to his said s and daughters, during their lives, and on the death of any or eit of them, leaving issue, to pay the principal to such issue, with be fits of survivorship in case either of his said sons or daugh should die without issue.

This will was proved in the Probate Court, and letters testament granted to the defendants. Benjamin Smith's property was wo upwards of £80,000 at the time of his death.

The plaintiff contends that the recital or statement of the c sideration in the deed of the 18th October, 1844, amounts to admission, on the part of Benjamin Smith, that he has made certa provision for his daughters, Charlotte and Martha Jane, by his w then executed, and that such provision being the consideration up which the conveyance was made to him by his daughters, he had right to revoke that will and make other and different dispositio of his property, whereby the plaintiff is deprived of the benefits would have been entitled to under the first will.

The defendants contend: 1st. That there is no evidence of a such agreement by Benjamin Smith. 2nd. If there was such agreement, there was no undertaking by B. Smith that he would n revoke or alter his will. 3rd. That the agreement relating to interest in lands, and not being in writing, is void by the Statu of Frauds. 4th. That the agreement was put an end to by the su stitution of a new consideration, which had been paid by Smith the plaintiff's mother. 5th. That the agreement, if any, ceased the death of Mrs. Gilpin; and, at all events, the plaintiff wou have acquired no right under the will of 11th September, 1841, un he was twenty-one years of age, and therefore could not maint this suit, even if there was a binding contract.

As to the first point: The deed here was in the form of an inde ture between Charlotte Smith and Martha Jane Smith of the o part, and Benjamin Smith of the other part; and though not seal by him, yet, if he agreed to it, it is said he would be bound by a covenants contained in it. Com. Dig. "Fait." (C 2). Cruise's D "*deed*," ch. xxvi, § 3, Shep. Touch. 53, the acceptance of a deed bei considered equivalent to the actual execution of it; though the c rectness of this proposition has been denied. Platt on Cov. There can be no doubt, however, I think, that a person accepting conveyance, and taking the benefit of it, must be considered to ha taken it upon the terms and conditions expressed in it; and wh (as in the present case) the deed states the consideration to be a c

tain provision made by the grantee for the grantor, it must amount to a representation on his part, that he had made such provision, and to an implied agreement to perform what was so represented, being the consideration on which the property was conveyed to him. It has been argued that there is no evidence of the acceptance of this deed by the testator; but I think there is ample evidence of it. It is traced to his possession about a month after its execution, and it is found in his possession at the time of his death, nearly fourteen years afterwards; it is in the handwriting of a person since dead, who is proved to have been afterwards, if not at that time, Mr. Smith's attorney and legal adviser; and it is acknowledged by the daughters before a Justice of the Peace, who was the first executor and trustee named in the will then executed, and whom Smith there styles his "friend," and who may be presumed to have been on terms of intimacy with him; and lastly, he paid the Registrar's fees for recording the deed. It would be most unreasonable to presume that Smith's daughters executed this conveyance to him, and caused it to be registered without his knowledge. What motive could they have for doing so? What benefit could they derive from it? Is it probable that they could have known that he had made "certain legacies and provisions" for them by his will, unless he had communicated it to them? With these facts before me, I cannot come to any other conclusion than that the deed was made in pursuance of an agreement between Mr. Smith and his daughters, and that it was executed by them, and accepted by him upon the consideration expressed in it, though it is only stated as a recital, for the language of a recital may constitute an agreement. Graves v. White, (2 Eq. C. Ab. 652). Jendwine v. Agate, (3 Sim. 141). Saltoun v. Houstoun, (1 Bing. 444). Carpenter v. Buller, (8 M. & W. 209). Carter v. Carter, (4 Jur. N. S. 63, 3 Kay & J. 618). It is unnecessary to determine whether the recital amounts to an estoppel, as against Smith, after accepting and acting upon the deed. There is no doubt that a person may be estopped by the recital of a fact; but whether it is an estoppel or not it is certainly evidence of an agreement. In Carpenter v. Buller *(supra)* it is said: "If a distinct statement of a particular fact is "made in the recital of a bond or other instrument under seal, and "a contract is made with reference to that recital, it is unquestion-"ably true, that as between the parties to that instrument, and in "an action upon it, it is not competent for the party bound to deny "the recital; and a recital in instruments not under seal, may be "such as to be conclusive to the same extent." By "*the party bound*," in that case, is no doubt meant the party who executed the deed; but a person may be estopped by his acts as well as by his deed, as, by the acceptance of an estate, or by representations which have been

acted on by others. Pickard v. Sears, (6 A. & E. 475). Gi
Wells, (10 A. & E. 90). Freeman v. Cook, (2 Exch. 654). '
the benefit of an Act may create an estoppel. Story's E
§1542. In this case, according to the view I take of the ev
Smith's daughters were induced to alter their position and pa
their property, by his representation that he had made certa
visions for them in his will, and which, in fact, he had don
recital in the deed, therefore, is entirely consistent with the f
they existed at that time, and the case does not require the a
tion of the doctrine of estoppel, there being no misrepresenta
any fact. In most of the cases the agreement sought to be er
was something to be done in *futuro;* but here it was of som
that had been done, the representation of a fact and not me
an intention to do something as in Jorden v. Money, (5 H. Lo
185, 31 Eng. R. 20).

Assuming that there was an agreement by Smith to provi
his daughters by his will, is that such an agreement as will
forced in a Court of Equity? Supposing the case not to be a
by the Statute of Frauds I have no doubt such an agreemen
be enforced, and there are numerous cases to that effect. In (
v. Kemp (3 Swan, 404 *n*), a covenant to give a fourth part
covenanter's estate at the time of his death was enforced agai
estate of the covenantor, who had made a different disposition
property. In Jones v. Martin (5 Ves. 266 *n*) a covenant by a
on the marriage of his daughter, to give or leave by will all h
sonal estate equally among his children, was decreed agai
estate, and a disposition of his property, at variance with the
nant, was set aside. In Fortescue v. Hennah (19 Ves. 67),
decided that a covenant by a father to divide his property,
death, equally between his daughters and their families, cou
be defeated by a testamentary act. Sir Wm. Grant, M. R., in
judgment says: "Robert Hicks having covenanted that his
"daughter and her first husband, and her children by him, a
"at the death of R. Hicks, have a moiety of all the real and p
"estate of which he should die seized or possessed, it is clear t
"could not defeat the effect of that covenant by any testam
"act." The next case is De Beil v. Thomson (3 Beav. 469), w
written statement by a parent on the proposed marriage
daughter, that he intended to leave her £10,000 in his will
settled on her and her children, was held to be binding on hi
to be satisfied out of his estate; the marriage having taken
and the father not having left that sum by his will. This ca
affirmed by the House of Lords on appeal. Hammersly v. I
(12 Cl. & F. 45). Lord Cottenham, in that case, said: "A re

"tation made by one party for the purpose of influencing the con-"duct of the other party, and acted upon by him, will, in general, be "sufficient to entitle him to the assistance of this Court, for the pur-"pose of realizing such representation."

In Moorehouse v. Colvin (15 Beav. 341; 9 Law & E. R. 136), the question was whether a letter written by the testator, prior to his daughter's marriage, and after the making of a will in which he left her a lac of rupees, created a contract to settle the lac of rupees upon her; he having, after her marriage, made another will, by which he disposed of all his property, without making any provision in favor of his daughter. The letter stated that his daughter should have £2,000 on her marriage, and that would not be all; that she was, and would be mentioned in his will, but to what further amount he could not then say. It was held that the letter did not create any contract, though the right to enforce contracts of that nature was admitted.

So, in Maunsell v. White (4 H. Lords' cases 1039 S. C. 31, Eng. R. 1), where the suit was brought to compel the trustees under the will of the plaintiff's uncle to convey certain property to him, the question was whether a letter written by the plaintiff's uncle to him, pending a treaty for his marriage, amounted to a contract to settle this property on the plaintiff; and it was held that it did not, the uncle having expressly refused to make any settlement of his property, and not absolutely representing that the plaintiff would be entitled to any benefits under his will, but in fact reserving the power of altering his will. The Lord Chancellor, in that case, says: "Where a person makes a representation of what he says he has "done, or of some independent fact, and makes that representation "under circumstances which he must know will be laid before other "persons who are to act on the faith of his representation being true, "and who do act on it, equity will bind him by such representation, "treating it as a contract. Suppose that this gentleman had on the "eve of the marriage said to the appellant, you may safely enter into "this marriage, for I have executed a deed by which I engage to "leave you such and such estates; if, on the faith of that represen-"tation, the nephew had married, the uncle would then have made "a representation on which he knew that this nephew would act, and "it would be a fraud on the nephew, or on those who dealt with "and came after him, to set up as an answer that that was a mere "intention which he had entertained at the time. The uncle would, "in fact, have made a contract, and he would be compelled to make "it good, for he would have made a representation with a view to "induce others to act upon it, and on the faith of it they had at the "moment acted. That would be a representation which, under the

"circumstances I have stated, would be in fact a contract." Lor St. Leonard says: "I do not dispute the general principle, that wha "is called a representation, which is made as an inducement fo "another to act upon, and is followed by his acting upon it, will "especially in such a case as marriage, be deemed to be a contract."

In Loffus v. Maw (8 Jur. N. S. 607; 3 Giff., 592), a testator, ad vanced in years and in ill health, induced the plaintiff, his niece, t reside with and take care of him, on a promise that if she would d so he would provide for her at his death by leaving her a life estat in certain property; and, by a codicil to his will, which was soor afterwards prepared and read over to her, the trustees of his wil were directed to stand possessed of the property upon trust, to allow the plaintiff to receive the rents and profits for her life. The testator afterwards executed another codicil by which he revoked th disposition in favor of the plaintiff. It was held that he was boun by his representation to the plaintiff, and had no right to revoke th codicil in her favor, and that she was entitled to a decree for th performance of the trusts created for her benefit. Ridley v. Ridle (11 Jur. N. S. 475) may also be referred to on this point, The bi in that case was filed by the children of George Ridley to obtai from the estate of Samuel Ridley compensation in satisfaction of promise alleged to have been made by him, to leave by his will the plaintiff as much as they would get under the will of their fath provided they would convey a part of the property of their fath to Edward Ridley, a brother of Samuel Ridley, and which conve ance they executed. It was held that the plaintiffs were entitled have the promise made good out of the estate of Samuel Ridle though it was only verbal, and Samuel Ridley had repeatedly den having made any such promise. One objection taken was that t agreement was void under the Statute of Frauds, as being a contr not to be performed within a year, but this was not sustained.

The latest case on this subject is Caten v. Caten, (Law Rep. 1 Ch 137; 12 Jur. N. S. 171). The bill was filed for the purpose of carrying into effect an alleged agreement between the plaintiff and her late husband, prior to their marriage, by which her own, and a part of his, property was to be settled on her. A memorandum had been drawn up by the husband, but not signed, and given to a solicitor as instructions to prepare a settlement; the settlement was prepared, but not executed, in consequence of a promise by the husband to leave the plaintiff, by his will, property of equal amount to that intended to be settled on her. He made a will according to his promise, which was executed on the day of the marriage, and he got possession of the plaintiff's property. He afterwards made another will, without her knowledge, revoking his former will, and giving

the principal part of his property to the defendants; the amount given to the plaintiff being considerably less than she had received from her own fortune previous to her marriage. The defendants denied the making of the alleged agreement and pleaded the Statute of Frauds, the agreement being made upon consideration of marriage. V. C. Stuart made a decree in favor of the plaintiff, considering that the agreement was sufficiently proved, and that there was a part performance. On appeal to the Lord Chancellor this decree was reversed on the ground that there was no contract in writing signed by the testator, and that there had been no part performance by the plaintiff to prevent the operation of the Statute of Frauds; the execution of the will by the testator in conformity with his promise not amounting to a part performance, because a part performance by the party sought to be charged, is not sufficient to take a case out of the statute. This judgment was appealed from to the House of Lords, (Law Rep., 2 H. Lords, 127), on the ground that the memorandum written by the testator was a sufficient contract within the Statute of Frauds, the ground previously taken of part performance of the parol agreement having been abandoned, and the judgment of the Lord Chancellor was affirmed.

In the present case, the original will of the 11th September, 1841, though revoked by the subsequent will, was not destroyed, but was retained by the testator and has been produced in evidence, and, therefore, we are not left to the uncertainty of parol evidence to ascertain what his intentions were at that time in regard to the division of his property; and it confirms the statement in the deed from his daughters, that he had given legacies to them, and made provision for them in his will. His acceptance of this deed was an admission that the conveyance was made to him in consideration of the provision he had made for his daughters by his will, and, with the other circumstances before referred to, is sufficient to warrant the conclusion that he had communicated the provisions of his will to his daughters, and requested them to convey to him their interest in their mother's property, and that they did agree to convey to him upon that consideration, as stated in the 10th and 11th paragraphs of the bill. Having made this representation to them, upon which he intended them to act, and upon the faith of which they did act, and conveyed their property to him, his representation amounted to a contract, and he was beund to perform it.

It was contended on the part of defendants that even if there was such contract at the time the deed was executed, there was no agreement by Smith that he would not revoke or alter his will. But I think an agreement not to revoke or alter the disposition of his will in favor of his daughters must be implied in this case, and must

have been intended by the testator from the very nature of the transaction: otherwise, it must be presumed that he intended to commit a fraud upon his daughters, by getting the title to their property, and at the same time reserving to himself the right at any moment to deprive them of the consideration. *Vide* Walpole v. Lord. Orford, (3 Ves. 412). It would be a most unreasonable construction of the agreement to hold that, because the testator did not expressly promise not to revoke or alter his will, that he had a right to do so, and thus, while he kept the property, to deprive the grantors of the benefit of the consideration on which it was conveyed to him. Contracts are to be performed in that sense in which the promisor believes that the promisee has accepted the promise; and it will scarcely be argued that if Smith obtained the deed from his daughters on his representation that he had given certain property to them by his will, he believed that they understood he had the power at any moment to deprive them of the consideration on which they had agreed to convey. The fair and reasonable construction of the agreement is that at his death they were to receive the agreed price of their property, and they could not have understood it in any other way. If the representation of a fact amounts to a contract, as is said by the Lord Chancellor, in Jordan v. Money, *(supra)*, Smith has no right to revoke it. This objection therefore fails.

I have next to consider whether the agreement was void by the Statute of Frauds (1 Rev. Stat. c. 123) as being a contract for sale of lands. I think it is not a case within the words of the statute. Is it a contract for the *sale* of lands? A similar objection was taken in Loffus v. Maw *(supra)* where the testator verbally promised to leave his niece a life estate in two houses, and executed a codicil to his will in conformity with that promise, which codicil he afterwards revoked. The codicil giving the property to the niece was produced in that case, as the will has been in this case, and was treated by the Vice-Chancellor as evidence in writing of the representation made by the uncle, and it was held that the Statute of Frauds had no application to a case of that kind. I am aware that the correctness of this decision has been questioned, (*vide* 8 Jur. N. S., Part II., p. 281), though it was not appealed from. But it is not necessary in the present case to determine whether the agreement was within the statute, for admitting that it was, that it related to a sale or parting with an interest in land, Kelly v. Webster, (12 C. B. 282), I think there was clear evidence of part performance; indeed, so far as the testator's daughters were concerned, there was a complete performance of the agreement by the conveyance of the property—an irrevocable act on their part, (for I think the deed was not a mere voluntary deed, but was founded on a valuable consideration), and

'hich would make the setting up of the statute as an answer, eans of committing a fraud upon them.' This a Court of Equity lways endeavor to prevent. Sugd. Vend. (14th ed.) 148, 151, y v. Joliffe, (5 My. & C. 167). Lester v. Foxcroft, (1 White & L. C. 625, 637).

vas contended that the defendants could not set up the estate efence, because they had not claimed the benefit of it by their r. If a defendant by his answer admits the agreement, but ls to rely on its not being binding because it was not in writing, st claim the benefit of the statute, otherwise he is considered nit that the agreement is binding. Dan. Pr. 542; Skinner v. well, (12 Jur. 741, 2 DeG. & S. 255); Ridgway v. Wharton, G. M. & G. 689). But the questson does not arise here, because fendants (except Dr. Gilpin) have not admitted the agreement ir answer, and state their belief that no such agreement was d into. Dr. Gilpin has no personal knowledge of it, but states lief, from information received from his wife, that such an nent was entered into. (See par: 27 of his answer).

next objection is, that the agreement, if any, was put an end a subsequent arrangement between Smith and his daughters, ich he undertook to pay them £500 each, for their property, hat this sum had been paid to the plaintiff's mother. The lants were bound to prove this, and they rely principally on ry in Smith's ledger, in the handwriting of Thomas Plummer, ceased clerk, dated 9th May, 1849, by which Dr. Gilpin is ed with £500 as the "amount of claim of Mrs. Gilpin (late lotte Smith) in the estate of the late Joseph Canby, her grand- r."

ll the cases where entries made by a deceased clerk have been ed in evidence, it has been proved that it was his duty to do t and make a record of it,—that the entry was made in the scharge of the business about which he was employed. Poole as, (1 Burg N. C. 649); Doe v. Turford, (3 B. & Ad. 890); v. Blakey, (Law Rep. 2 Q. B. 326). It is not shewn here that any part of Plummer's duty to do any act relative to this ty, or that he had any peculiar knowledge of the facts, or did t except this entry in the ledger. It was not a matter which come within the scope of his duty as a clerk in the employ of as a merchant, because the purchase of the property was a r arrangement, quite distinct from Smith's general mercantile ss. On this account, therefore, I think the evidence was not sible. But it is said that it is admissible on other grounds, y, as a declaration of Smith against his interest, because he y charged himself with £500, and also as part of the *res gestæ*,

and explanatory of the terms on which he was holding the property There is no doubt that declarations or entries against the pecuniary interest of the person making them may be evidence against third persons after his death. Taylor on Evid. § 603, the Sussex Peerage case, (11 Cl. & F. 103). But the declaration must be directly against the party's interest. In Smith *v.* Blakey *(supra)* Blackburn, J., says "When entries are made against the pecuniary interest of the person "making them, *and never could be made available for the person* "*himself*, there is such a probability of their truth that such state-"ments have been admitted after the death of the person making "them, as evidence against third persons." But was this entry against the pecuniary interest of Smith? Was it not rather a declaration in his own favor, and in reality shewing that he held the property on other and better terms than those stated in the deed The evidence on the part of the defendants was offered to shew, not merely that Smith had purchased the property from Mrs. Gilpin for £500, and was indebted to her or her representative in that sum, but that he had actually paid her in full. Taken in itself, perhaps the entry might be evidence, but looking at the whole testimony, I think it was in effect a declaration in his favor, rather than against his interest. On the other ground, as being explanatory of the terms on which he held the property, that is, to shew that he gave a different consideration for it from that stated in the deed, I think the entry was also inadmissible. The declarations of a person against his proprietary interest, or in disparagement of his title, are evidence as, when a deceased occupier of land admitted that he held as tenant of another, thus cutting down his *prima facie* title in fee, because it is not to be presumed that a man would untruly admit that he held by an inferior title. But that is not the present case: the declaration was not offered here to cut down Smith's title to the property, or in any way to qualify his possession, but to shew that he had purchased it on a different consideration from that stated in the deed, and in reality to support his title to it. The case of Rawson *v.* Haigh (2 Bing. 99) is very distinguishable from this. There letters written by the bankrupt at the time of leaving his residence and recently after, while the Act continued, were received to shew his intention in leaving, which could not otherwise be ascertained But here, the declaration was made long subsequent (about four and a half years) to the delivery and acceptance of the deed, which was a perfect and complete transaction, expressing on its face the intentions of the parties; and the effect of it was to contradict, and not to explain the deed. In Nutting *v.* Page (4 Gray 584) cited in Greenl. Ev., § 108, it is said that it is only when the thing done is equivocal, and it is necessary to render its meaning clear and expres

sive of a motive or object, that it is competent to prove declarations accompanying it, as falling within the class of *res gestæ*. Mr. Greenleaf, treating of the admission of declarations as part of the *res gestæ*, says, (sect. 108), "The principal points of attention are whether the "circumstances and declarations offered in proof were contemporaneous with the main fact under consideration, and whether they "were so connected with it as to illustrate its character." According to the English cases it is not absolutely essential that the declarations should be contemporaneous with the main fact, but they must be so connected with it as to make one continuous transaction. Roach v. Great Western Railway Company, (1 Q. B. 60), Taylor Ev. § 526. The principal fact here was the consideration of the deed executed in October, 1844, and which, being registered, vested the title to the property in the testator in the following month—nothing more remaining to be done during his life—then how can a declaration of his, made in 1849, as to the consideration, be said to be a continuous act?

It was also contended that the statement by the testator in the codicil, dated November 23, 1852, that he had fully settled and accounted with his daughter, Martha Jane Ruel, for her share of the real estate left by her mother, ought to be taken in consideration, and the case of the Attorney General v. Stephens (35 Eng. R. 390) was cited on this point. But, apart from the fact that any arrangement between the testator and his daughter, Martha Jane, could not affect this plaintiff's rights, the case does not appear to me to support in any way the position taken here. In that case the defendant's title deeds were received in evidence, not to prove a declaration made by the defendant himself, but to rebut an entry in parish books of payment of rent, and to explain the probable intention of the defendant in making the payment, a rent charge being reserved by the deeds.

After what has been stated about the admissibility of the testator's written declarations from his books, it will scarcely be necessary to say that his verbal declaration to his wife, as proved by her, that he had paid his daughter Charlotte £500 for her share in her mother's property, was not evidence against the plaintiff.

I come now to that part of Mrs. Smith's evidence in which she speaks of having received a letter from Mrs. Gilpin, stating that her father (B. Smith) had paid her for her share of her mother's property, and that her husband (Dr. Gilpin) had invested it for her. This letter was not produced, Mrs. Smith stating that she had searched for it, and believed she had destroyed it, as she did not attach any importance to it, and had no reason to remember it more than any other letter she had received from Mrs. Gilpin. I do not attach

any importance to the conversation between Mrs. Smith and her two step-daughters, in which Martha stated that Mrs. Smith's children should never have any part of her (Martha's) mother's property. Such loose declarations, made, apparently, under excitement, ought not to affect the rights to property.

There were two letters in evidence written by Mrs. Gilpin to her father, one dated March 6, 1849, in which she acknowledges the receipt of £50 sent by a Mr. Craig, and adds in a postscript, "I forgot to mention another £50 by Mr. Budd, received the day after the Dr. wrote you, making in all £250." The other letter dated St. Patrick's day, 1849, in which she acknowledges the receipt of a letter from her father enclosing £100, and says she hopes they may be able to keep the money to educate their little boy; but that the Doctor was afraid they should be obliged to use some of it. In addition to these were some letters from Dr. Gilpin to Mr. Smith. In one, without a date (marked No. 10), he says: "Your letter of the "11th came to hand yesterday, as well as a draft for £250 in favor "of Wood, which I accepted. The £300 being lodged in H. B. Com-"pany to my credit." In another (No. 11) dated in 1851, he says: "I received your last note enclosed to Wiswell, and am much obliged "to you for your offer. When I invested Lottie's (*i. e.*, Charlotte's) "£300 there was £10 left, from which I took £2 to make up my "rent," &c. In another letter (No. 12), without any date, he says: "Your letter to Mr. Budd, enclosing £100, Halifax currency, came "safe to hand."

In his evidence, Dr. Gilpin says that his wife frequently received money from her father; that at one time he gave her £300, which he (Dr. Gilpin) invested in bank stock (the investment referred to in the letter dated 1851), that he did not know what her father gave her the £300 for, but thought it was a gift, and that Smith afterwards told him that when he gave his daughter a house this £300 must come out of it; that his wife never, that he heard of, received any money from her father in payment of the property inherited from her mother; that he did not know that the £300 had anything to do with the property; and that he had never received a farthing from Smith on account of it; that Smith did a good deal of banking business in Halifax, in which he (Gilpin) acted as his agent for a number of years; that the £100 referred to in letter No. 12, was money forwarded, against which Smith would draw. That the £200 mentioned in the letter from Mrs. Gilpin, dated March 6, 1849, referred to exchange; that it remained till Smith came to Halifax, when he made use of it; that the £100 mentioned in his wife's letter of the 17th March, 1849, was not intended for her, though she thought it was; that he deposited it in the bank, and when Smith

came to Halifax, Mrs. Gilpin asked him for the £100, and he refused to give it to her, and took it himself; that his wife must have been in error when she wrote respecting that money, "The Dr. is afraid we shall be obliged to use some of it." He denied having stated to Mrs. Smith or her son Benjamin that he had received his wife's share of her mother's property and invested it; but admitted saying he had received £300 for his wife (which he said he had never denied), and invested, though he did not speak of it as her interest or her mother's property. On this point he is contradicted by Mrs. Smith, and her son, Benjamin Smith.

If Dr. Gilpin's evidence is to be relied on, he has explained the statements in those letters which, without explanation, would go to support the defendant's argument, that Mrs. Gilpin had been paid for her share. This part of his evidence is uncontradicted, except, perhaps, by his wife's letter, dated 17th March, and I do not feel myself justified in discrediting it, though there is some discrepancy between his evidence and some portions of his answer as to his knowledge of the deed. On that part of his testimony where he is contradicted by Mrs. Smith and Benjamin Smith, I need only to refer to the experience of every person engaged in legal tribunals, for the extreme difficulty of obtaining a correct account of conversations, particularly after the lapse of two or three years, and of the very unsafe and unreliable nature of such evidence. If Dr. Gilpin, in speaking of the £300, called it "Charlotte's money," or his "wife's money," there would be nothing extraordinary in Mrs. Smith and her son understanding him as calling it her "property," or even her "share" of the property. The same remark will apply to Mrs. Smith's statement of the letter received from Mrs. Gilpin, which Mrs. Smith admits she thought of no importance, and had no particular reason for remembering. As Mrs. Gilpin died in March 1851, that letter must have been written more than fifteen years before Mrs. Smith undertook to speak to the contents of it. It certainly would have been a very important piece of evidence. The omission or addition of one or two words would entirely alter the construction of it; and in the absence of the letter itself, and the admission said to have been made in it being entirely opposed to Dr. Gilpin's evidence, I must look to the other circumstances in the case, in order to ascertain which is the most reasonable and probable view to be taken, and on which side the evidence preponderates.

In the first place, it is very improbable that if the agreement was that Smith should purchase the property from his daughter for £1,000, that the deed, drawn by a professional man of intelligence and skill, should state an entirely different and very unusual consideration; or that Smith, with his peculiar habits and knowledge

of business, would have accepted the deed stating such a considera-tion, out of which complicated questions would very naturally arise, instead of stating the true consideration of a simple purchase for a certain sum of money. Secondly, if the agreement for the £1,000 was made subsequently to the giving of the deed, and in lieu of the consideration there stated, why is it that Smith kept no written proof of so material a change in the rights of his daughters, not one at all likely to be for their benefit, and why is it that Dr. Gilpin, the husband of one of his daughters, knew nothing of it, if it took place after his marriage? If such an arrangement was made, Mrs. Rue must have been a party to it, and her evidence might have been produced, or, at least, some reason shewn why it could not be obtained. Again, as to the payment of the £500 to Mrs. Gilpin, why is it that her husband knew nothing of it? for I cannot disregard his positive evidence that he never received a farthing of it, nor knew that the money she received from her father had any thing to do with it. There is nothing improbable in the account given by Dr. Gilpin of the £300. It would be a very natural and reasonable act for a parent, worth from £30,000 to £40,000, to give his married daughter such a sum, particularly where we find him making the statement in the codicil to his will, dated 22nd September, 1848, after the marriage of his daughters, and wherein he revoked the legacies of £1,000 on their marriage, "that they had been, and still would be, to some extent, assisted by him." So, the statement to Dr. Gilpin, by Smith, that when he gave his daughter the house, the £300 must come out of it is quite inconsistent with such sum being a payment on account of her share of her mother's property. After a careful consideration of the evidence, I think the defendants have failed to establish that the purchase was made by Smith on a different consideration from that stated in the deed.

I come now to the last objection, that the agreement by Smith, if any, was to leave legacies to his daughters and not to their children, and that the death of Mrs. Gilpin, in her father's lifetime, put an end to the agreement; or, at all events, that the plaintiff could acquire no rights until he attained twenty-one years of age. The clause of the will, bearing on this question, declares that, if any of the testator's children should die leaving a child or children, then *such child or children should represent the parent in any division* of property which might thereafter take place, according to the provisions of his will, the share of such parent being equally divided among such children (if more than one), the share of each son to be paid at the age of twenty-one, and of each daughter at the age of eighteen or on her marriage, and each child to be entitled to the annual income of its respective share until the principal was paid—

Where the testator has expressly directed that in case of the death of any of his children, leaving issue, such issue should represent their parent in any division of property under the will, may it not be said that the "legacies and provisions made for them" included their children also? As it was one of the provisions in the will that the children of the daughters should stand in their place, was it not as much a part of the consideration for the deed that a child of one of the daughters dying in the father's lifetime, should represent its deceased parent as that the daughter herself should be entitled to a share under the will, if living? May Mrs. Gilpin not be considered as saying to her father, "In consideration of your having given to me, and to my children in case of my death, a certain share of your property, I agree to convey to you my share in my mother's property?"

Without any such declaration as to children representing deceased parents, a legacy would not lapse under the 28th section of the Wills Act (1 Rev. Stat. 281) unless a contrary intention appeared by will. Here it may be said that a contrary intention does appear, by an express declaration that no legacy shall vest unless the child or grandchild attain the prescribed age. But then there is a provision that each child shall be entitled to the annual income of its respective share till the principal is paid. Such a direction has been held to be evidence of intention to vest the capital in the legatee and only to postpone the time of payment or possession. Watson v. Hays, (5 My. & C. 125); Davies v. Fisher, (5 Beav. 201); *In re* Hart, (4 Jur. N. S. 1264). But it could not do so where the will contains an express declaration to the contrary. It more resembles the cases where an interest is held to vest, liable to divest in case the party dies before the money is receivable. Saunders v. Fautier, (Cr. & P 240); Rammell v. Gillow, (9 Jur. 704). It is not necessary, however to consider these questions. Though I am not entirely free from doubt on this point, I think it is sufficient that the plaintiff was to represent his mother, in case of her death, and that though he would not be entitled to her share unless he attained twenty-one years of age, he was entitled to the annual income of that share in the meantime, and, therefore, would have a right to maintain the suit in order to obtain the annual income. Wms. Ex. 1106, Phipps v. Annesley, (2 Atk. 58); Green v. Pigot, (1 Bro. C. C. 103); Carey v. Askew, (2 Bro. C. C. 58).

There must, therefore, be a declaration that the plaintiff is entitled to the benefit of the trusts created in favor of the testator's daughter, Charlotte Smith, by the will dated the 11th September, 1841, and that the testator had no right to revoke the said trusts, and that the will of the testator, dated the 10th October, 1856, and the codicils

thereto, so far as they revoke the trusts created in favor of Charlotte Smith by the will dated 10th September, 1841, be set aside, and that the trusts, so created, in favor of the said Charlotte Smith and her child, or children, be carried out and performed in favor of the plaintiff, according to the provisions of the will dated 11th September, 1841. That an account be taken of the testator's debts, funeral and testamentary expenses, and of the amount of real and personal estate of which he died seized and possessed, also an account of any moneys paid by the testator to the plaintiff's mother, Charlotte Gilpin, after her marriage. The costs of all parties to be paid out of the estate. Reserve all further directions.

A. L. Palmer, Q. C., and *Kaye*, Q. C., for the appellants:

1. The case as set out in the bill is one of fraud and misrepresentation. The decision on which the Judge grounded his decree was one of contract. [ALLEN, J.: The bill does not charge any misrepresentation.] We shall endeavor to shew the Court that such an agreement, even if it existed, must be one the parties to it never intended to make and never supposed they had made. Supposing they intended to rely on the supposed agreement with the exception of Mrs. Martha Ruel, no living party would be able to speak to what passed at the execution of the deed; the pecuniary consideration of the deed was sufficient, and the other consideration being revocable, was no consideration at all. [RITCHIE, C. J.: Where a party makes a contract, the consideration of which may be revoked, is there not an implied contract that he will not revoke it?] We contend that there is no absolute promise in the agreement that he will leave a sum by his will, although the will is referred to. [RITCHIE, C. J.: The words of the deed shew differently. It says, "for and in consideration of the legacies and provisions made for them, by the last will and testament of the said B. S." Can we believe that a father would make an agreement for a consideration which he revoked next day?] Can we suppose that a child would have had such a sum of money left to her, a fifth of his property, and not have known it? Dr. Gilpin states that he knew nothing of her being entitled to a fifth of her father's property until after his wife's death, and can it be believed that when B. S. put his hand to that instrument, he believed he could not revoke it? [RITCHIE, C. J.: I think if he did intend to revoke it, he was a bad fraudulent man.] If he was so, it is singular that he preserved all the papers that contained the evidence of the fraud. A consideration which is revocable is no consideration. *In re* Mary Dixon, (4 M. G. & S. 631). Suppose there was no dispute about the contract, who is to enforce it, could not she rescind it, and what has the child

to do with it? Before you can enforce a contract in equity, it must be such a contract as may be sued on at common law. [RITCHIE, C. J.: I apprehend that when the mother dies the contract inures to the benefit of the child.] This contract, if it existed, only applied to the daughter and did not extend to her children. The learned Judge says that the children are substituted for the parent, but how are they substituted? If they take as from a vested interest in the mother, they do it subject to her debts. The provision in the will was simply for the benefit of the daughter. In any case the plaintiff does not obtain a vested interest in it until he arrives at the age of twenty one; and the decree is wrong in setting aside the last will until he attains that age. And the legatees under the first will should have been made parties. By the will the devise was to the trustees, and not to the children, and those trustees of the former will oughe to be parties. The case made by the bill is entirely different from the decree. They put their case not on the deed but on certain independent facts and representations. Even supposing the recital in the deed might infer a contract, it is not one, as regards pleading, of the nature which they attempt to set out. The deed having been made to the use of the will then made, and the will being revoked, there is a resulting trust to her, and B. S. was never any thing more as regards that land than a mere trustee. The plaintiffs, before seeking to take the benefits of the provisions of the former will, should disclaim all interest in the latter. The contract, if made, being a contract for the sale of lands, was void under the Statute of Frauds. Toppin *v.* Lemas, (15 C. B. 145).

Thomson, Q. C., with him *Fraser*, contra. As to the trustees of the former will being necessary parties, it is surprising that such a point should have been raised in the case. The present trustees should be as anxious as the plaintiff to know their duty, and should not raise such merely technical objections. But it would have been improper to make the other trustees defendants. It is the gift which we require, not the hands which hand it over, and besides this point was not taken in the Court below.

The general principal that a man can bind himself so that he cannot dispose of his property by will, is not denied by the appellants; and it is clear that a man may make the particular manner in which he will make his will, the subject of contract. Loffus *v.* Maw, (8 Jur N. S. 607). This case is important in shewing that a will in *esse* is a thing which a man may come in and set up as the condition of a contract not revcoable. If that case is law it meets the appellant on both points, shewing that the consideration is not revocable, and that this case is not within the Statute of Frauds. The plaintiff in

this case is the issue of Charlotte Smith who, by operation of law, would have taken that property had not the arrangement been made, and this fact rebuts the idea that it was intended to be an arrangement only to take effect in case of the daughter surviving the father. Instead of reciting the will *in extenso* in the deed for every curious eye to see, they refer to the will for the consideration. The two instruments must be read together. At the time the will was made these girls were both unmarried, and it was, therefore, not necessary to refer to their children in the deed, but the will says, "for her and her issue." The child claims through the mother, and the devise was in fact to the daughter and her issue. The fallacy of the opposite view is further shewn by the words in the will, that in the division of the property the child should represent the parent. The husband could take nothing for the property never vested in her. DeBeil v. Thomson, (3 Beav. 469). This judgment was appealed from in Hammersley v. DeBeil, and sustained. The value of the property is immaterial, for they had to run the risk of B. S. being successful or unsuccessful in business. The cases shew that the law favors family arrangements such as this. Steckley v. Steckley, (1 Ves. & Bea. 30). In regard to the argument that Mr. Smith did not accept the deed and did not sign it, a deed that purports to be an indenture though not signed by one of the parties binds him, if it contain a contract. The attempt which was made to shew that Mrs. Gilpin had been repaid in money could only avail the defendants if they set up a substituted agreement, and they could not do so for a woman cannot make a binding admission without her husband's assent, and she was then feme covert.

Duff, Q.C., was heard on behalf of Dr. Gilpin, one of the defendants.

A. L. Palmer, Q. C., in reply.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

The substantial questions in controversy on this appeal seem to resolve themselves into these three:—

1st. Was there a contract entered into between Benjamin Smith and Charlotte, his daughter, binding on both and capable of being enforced in a Court of Equity?

2nd. Was such contract satisfied, abandoned, discharged or cancelled in the life-time of Charlotte, so as to relieve or release Benjamith Smith from its fulfilment?

If it was not,

3rd. Did that contract inure to the benefit of the present plaintiff in such a way as to enable him to enforce it in equity?

In addition to these some technical objections were raised which will be disposed of in order.

The facts bearing on the first point are few and simple. We may fairly presume from the evidence that Benjamin Smith was in 1841 in good circumstances, probably wealthy. His daughters, Charlotte and Martha Jane, were seized in fee (subject to the life interest of their father as tenant by the courtesy) of the real estate of their mother, which was of considerable value. We have no evidence of the ages of the daughters, nor any data from which to ascertain when they became of age, or whether they were so in September, 1841, nor have we the exact time of the marriage of Benjamin Smith with Jane Canby, their mother. It is said to have taken place previously to 1814, and she, it is stated, died in 1826, so that in 1841 these daughters may, consistently with the dates, have been under or over twenty-one years of age. B. Smith married again in 1836, and had in 1841, by such marriage, children living. On the 16th October, 1841, he made his will, by which, after providing for his wife, he divided his property equally among his children, viz., his two daughters, Charlotte and Martha Jane, the children of the last marriage then living, and those (if any) that may be thereafter born, making, however, his daughters, Charlotte and Martha Jane's, shares subject to this proviso: "Provided, however, that my said daughters respectively shall not be entitled to the said sum of £1,000 nor any other benefit hereinafter provided for them unless they shall respectively confirm and ratify, by all necessary legal means, all my acts and agreements relative to their mother's real estate, and shall also convey to the uses of this my will, all their right and interest in such parts of the said estate as shall remain in my possession not sold or otherwise disposed of." On the 18th October, 1844, a deed was executed by Charlotte and Martha Jane, by which they conveyed all their interest in their mother's property to Benjamin Smith, expressing on its face that such deed was made for and in consideration of the legacies and provisions made for them by the last will and testament of the said Benjamin Smith, their father, and also in consideration of the sum of 5s. to them paid. This deed was acknowledged on the 19th October, 1844, and registered on the 8th November, 1844. It was drawn by Mr. Perley, a legal gentleman then resident in St. John, and who, we think, the evidence satisfactorily establishes, was the legal adviser of Mr. Smith; and there can be no doubt that the deed was delivered to Benjamin Smith, registered at his expense and accepted and retained, and the property held by him

during his life thereunder, and on his death the deed with the property passed to the possession of the defendants and is now held by them as a portion of his estate. It cannot be disputed that up to the 18th October, 1844, Benjamin Smith might have revoked the will of October, 1841, and made any other disposition of his property that he chose, and which no person whatever would have a right to gainsay; the will was ambulatory and he had a perfect right to do with his property as he pleased, and though he declared his intention as to its disposition at one time, he could, as a general proposition revoke that intention at any time, or he might make the carrying out of such expressed intention dependent on any conditions or stipulations he chose to annex. But what we have now to determine is whether his position is altered by what took place in 1844, and to ascertain what the relative rights of parties are growing out of the whole transaction. The deed having been executed, delivered and recorded, Benjamin Smith unquestionably became the legal owner in fee of his daughter's property, and could from that moment use or dispose of it as he pleased. Did the daughters in return become entitled to any thing and what? It may not be amiss to bear in mind that Charlotte and Martha Jane are by no means in the position of volunteers, nor can the plaintiff be looked on in any other light than as a party seeking the enforcement of an agreement entered into, if at all, for a valuable consideration given at any rate by the side he represents, and to notice, likewise, that this Court looks with a critical and jealous eye on transactions between parents and children, whereby parents, while their children are still, morally speaking, under control, though actually legally free from parental restraint, obtain from children so situate either property or discharge from liabilities under which the parents may be to the children. And therefore Courts of Equity watch over and protect children in dealing with their parents who have a natural and just influence over them, and while looking with a kindly eye on and upholding family arrangements, as well for the division of property and the prevention of litigation as to preserve the harmony and affection to save the honor of the family, scrutinize rigidly all contracts whereby benefits are secured by children to parents, requiring them to be reasonable and to be entered into with scrupulous good faith and not allowing them to be perverted or used as a mere cover.

In this case we have two young females, who could not have attained their majority a very long time, and who were so far from emancipated as to be still living under their father's roof as part of his family, and dependent on him for their support, dealing with their father who takes from them a deed of all the property they appear to have any interest in, without the intervention of any se

ate adviser. This deed is prepared by the father's solicitor, and all would appear to be done at the father's instance. Such seems to us the fair inference, for there is no evidence of the daughters moving in the matter. It is not an arrangement that would be likely to occur to females situate as these were. It was not an arrangement from which they were to receive any immediate benefit. There does not appear to have occurred any thing between them and their father which would lead them to suppose he would treat them differently from his other children, or to suggest to them that they should give their father a consideration for providing for them at his death as he did for the others, and without information from their father they could have had no knowledge that he had made a will at all or what the provisions of the will, if made, or his intentions respecting them, were, or of his desire to have the absolute control of and disposing power over their property. On the other hand the father, by the arrangement, obtains an immediate absolute title to a large amount of property which he is thus enabled to dispose of as he likes. In looking at the terms of the will it would seem, from the condition on which the two daughters were to enjoy their share, as if Benjamin Smith had then already done something connected with the property that he had no right to do, for he requires them to confirm and ratify all his acts and agreements relative to their mother's real estate, and also to convey to the uses of that his will, all their right and interest in such part of the said estate as shall remain in his possession not sold or otherwise disposed of. If he had not then done any thing he clearly shews that he intended to exercise a control and disposition over it that he had no right to, even to the selling or otherwise disposing of it. We are left in the dark as to why Benjamin Smith delayed taking the deed from 1841 to 1844. It might be that the daughters were not of age in 1841, and, therefore, could not execute a valid deed, and, therefore, he protected himself by the proviso in the will. Or he may have hesitated to bind himself by the receipt of a valuable consideration to the absolute disposition of so much of his property at his death, or other reasons may have caused him to hesitate. This point the evidence does not enable us to solve. In 1844 the deed was executed, and the plaintiff's contention now is that when Benjamin Smith took the benefit of that deed, the provisions in his will revocable before came irrevocable, that is to say, though he might revoke his will, the transaction between himself and his daughters respectively amounted to a compact, and he could do no act whereby he could relieve his estate or the parties into whose hands, after his death, it should come. from fulfilling so much of it as related to those daughters. During the lifetime of Charlotte, Bejamin Smith does not appear to have attempted

to interfere substantially with the original disposition. Ch
married in August, 1846, and died on the 3rd March, 1851, l
the plaintiff, her only child, surviving, and on the 3rd Nov
1852, B. S. executed a codicil by which, after reciting the de
Charlotte, he cancelled and revoked all the bequests and prov
general and specific or residuary, to or for the benefit of hi
daughter or her children, in the said will contained, and on th
October, 1856, made an entirely new will, under which defe
now claim. Where there is a clear adoption of, and acting
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we think equity will not allow a party to enjoy property so ac
without carrying into full effect the contract or arrangeme
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of what was stipulated for in the will. Mr. Adams, in his e
thus states the principle: "If a benefit has been conferred as
sideration for any act, a party, who knowingly accepts that b
though he may not be bound by an actual contract or by a con
of performance annexed to the gift, is compellable in equity
the act." This is not the case of the mere expression of an
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intention or not, as subsequent events may incline his mind, in
case there is no contract. But it is the case of an act done by
and by, and in consideration of, that act he obtains a valuable
The moment, therefore, his daughters, at his instance, acted
inducement held out by him, and he accepted the benefit of

their act, the contract became complete, and having been irrevocably performed on the one side, we cannot understand upon principle how it is capable of being left unperformed on the other. It is in the nature of one of those species of contracts by proposal and acceptance which is constituted by a promise or representation made by the one party and acts done by the other, in consideration of and on the faith of such promise or representation, and therefore comes clearly within the principle enunciated by Lord Cottenham in Hammersly v. DeBeil, (12 Cl. 8 F. 62), that "a representation made by one party for the purpose of influencing the conduct of the other party, and acted on by him, will, in general, be sufficient to entitle him to the assistance of this Court for the purpose of realizing such representation"; or, as stated by Mr. Parsons, (2 Pars. 793), "when a man has made a declaration or representation, or done some significant act with intent that others should rely and act thereon, and upon which others have honestly relied and acted, he shall not be permitted to prove that the representation was false or the act unauthorized or ineffectual, if injury would occur to the innocent party who had acted in full faith in its truth and validity. Is this case not analogous to an offer made by letter and accepted and acted on? Suppose a letter written to this effect by A: "I have made my last will, and I have provided in it that B., to whom it is addressed, should have a legacy of £1,000 on condition and in consideration of of B's immediately transferring to A., the writer, twenty shares of stock in a certain bank which B. then held, and B. at once acquiesces, complies with the terms, transfers the stock, which A accepts; the stock vests in and is held by him, and is either disposed of by him or passes to his executor on his death. Could B's right to the £1,000 be defeated by the executor producing a codicil to the will made subsequent to the transfer revoking the legacy? Was there not an agreement complete in itself, from which neither could withdraw without the consent of the other? In what respect in principle does that case differ from this? It is true, here no letter was written, but is there not, as was said by Patterson, J., in Stick v. Hoe, (14 Q. B. 440), "a manifest connection between the thing to be done and the consideration, and the Court might infer a request from the party undertaking?" And, as was said by Lord Denman, C. J., in Webb v. Spicer, (13 Q. B. 893): "It appears from Com. Dig. Tit. Fat. (a 2), and Coke Litt. (231 a), that a man may be bound by the covenants of a deed, in which he is described as a party, though he does not execute it, if he assent to it and take a benefit under it." Here, then, B. S. does an act, he makes his will in which provision is made for his daughters. This provision is on a condition. This is communicated to them, we may easily infer, by the production to

them, by Smith, of the will itself. They comply in the fullest sense with the condition by making an absolute conveyance to Smith of their interest in their property, thus changing their position by parting with their property, and in the instrument by which they do this it is expressly declared to be done in consideration of the legacies and provisions made in their favor in the will. B. S. accepts the deed based on this consideration, it is registered, and the property passes absolutely to him thereunder. Here there is an act done by B. S., and in consideration (expressed in writing on the face of the deed of that act; an act is done by the daughters whereby they cease to own a large property and whereby B. S. becomes seized of it in fee. How can it be inferred from these acts that it was the intention of either party that when the daughters parted with their property by an irrevocable act, the act of B. S. should continue revocable, that he should be in a position of his own accord, by the mere destruction of the will or other act of revocation immediately after receiving this property, to deprive the daughters of the whole consideration. To suppose that he and his legal adviser, who drew the deed, contemplated that the daughters would be placed in this situation, is to suppose simply that they contemplated a gross fraud, which would leave them in the position of the "witless lad," upon whom it was sought to impose an inequitable arrangement, as described by Knight Bruce, L. J., in Baker v. Bradly, (2 Jur. N. S. 98), "who," he says, "in these transactions, in these operations, appears to me to have been a mere prey, ensnared and plundered by hands from which he ought to have received guidance and protection." But, on the contrary, we think we are bound to believe that at that time the agreement was not intended to be, and was not, unilateral, but fair, honest and reasonable, and that when the daughters were parting with their property, they were receiving in return a fair, just and valuable consideration; in other words, this contract is to be understood as Lord Campbell, in Watt v. Lord Londesborough, (3 E. & B. 33—), says: "Promises are to be construed according to the sense in which the promisor must be supposed to wish and believe that the promisee should be understood by the promisee." And this we are the more bound to do when we remember the principles on which the Courts of Equity deal with transactions between parent and child before referred to, and which are expressed by Knight Bruce, L. J., in a case of a gift from a child to a parent, as reported in Wright v. Vanderplank, (2 Jur. N. S. 599), in this forcible language: "But on the ground of the close attention, the rigid strictness and the watchful jealousy with which, on principles of natural justice, and upon considerations important to the interests of society, the law of this country examines, scrutinizes, and, if I may borrow an old expres-

sion, weighs in golden scales, every transaction between a guardian and ward, or between a parent and child, which, including or consisting of a gift from the younger to the older, takes place so soon after the termination of the legal authority, that the ward or child may, in consequence, probably not be in the largest and completest sense, not in mind as well as in person, an entirely free agent." And so with contracts; we think they should be viewed and construed, not as if the father intended to overreach the child, and while apparently giving a valuable consideration for a valuable property with one hand, be in a position to sweep it away by the stroke of a pen with the other, but as binding alike on both, to be carried out in good faith, that if the father gets the daughter's property, the daughter shall receive the consideration for which she transferred it. not a shadow, but the substance itself, that the arrangement shall not be so construed as to be a mere delusion, under cover of which the father may denude the child of all her property, and leave her with no other security than his own caprice. We must not, however, be supposed to rest this case alone on the relation of parent and child. We refer to this principle for the purpose of exhibiting the case in even a stronger light, than those where the principles which govern the case have been held to prevail. Covenants, agreements and settlements to dispose of property in a particular manner at death are by no means novel. Such arrangements have been frequently enforced. It is clear that a person may, by covenant or settlement, bind all the property of which he shall die possessed, and yet retain a free power of disposition during his life by speculations the most imprudent, expenditure even the most improvident, or by gift, if absolute and immediate, against which it is supposed his own interest will afford some security, provided, of course, it was not done in fraud of his covenant or agreement; but he is not allowed to defeat his covenant by any disposition which is in effect, though not in form, testamentary. With respect to the objection, so strongly urged, as to the operation of the Statute of Frauds, this does not seem to be a case within the operation of that statute; but if it is, we think there is a sufficiently signed contract to satisfy the statute. In Smith v. Neal, (2 C. B. N. S. 88), the Court held on the authority of the opinion expressed by Vice-Chancellor Kindersly in Warren v. Willington, (3 Dowl. 532), that a proposal signed by the person to be bound and accepted by word of mouth by the person to whom it is made is a sufficient agreement to satisfy the 4th section of the English statute. These cases have been followed in the Liverpool Bank v. Eccles, (4 H. & N. 139), and confirmed by the Court of Exchequer Chamber in Reuss v. Pickersley, L. R. (1 Exch. 342). The case before us is, if possible, stronger. Here everything was reduced to

writing by the parties, and all was done that could be done by the parties to complete the contract. B. Smith executed and published his will containing the bequest in favor of his daughters, and the condition on which those bequests were to become available to them; that was what he was to do. The daughters executed the deed, and thereby conveyed the property referred to in the condition, to B. Smith, which he accepts; that was what they were to do. The will and the deed then contain the contract. There was nothing further to be done on the daughters' part, and there remained nothing further to be done on the part of B. Smith, so far as the making of the contract was concerned. All he had to do was to perform it, and what is now required to be done is to be learned, not from parol evidence, but from the will and deed, and it is only now asked that the contract so made shall be carried out by the parties into whose hands the estate has come; that it shall be declared that he could not do any act to revoke or defeat what he then did, or that any act he may have done with that view shall be, as against the parties interested, void and of none effect, and that his estate shall be decreed to make good his undertaking; that having received his consideration, the daughters shall receive theirs; that they shall not be deprived both of their property and the consideration for which they parted with it; and that he or his representatives shall not be allowed to retain the daughters' property and that portion of his own, by promising which, he obtained theirs. But if the statute did apply, we very much doubt whether the defendants are in a position to rely on it as a defence in the suit, not having either pleaded it or raised the objection by their answer. We have always understood it to be a rule of pleading in equity that if a defendant intends to rely on the Statute of Frauds, he must specially plead it or raise the objection by his answer, and notwithstanding the case of Ridgeway v. Wharton, (3 De G. M. & G. 677; Hays v. Astley, (L. J. 10, 11, 63; 3 N. R. 19; 12 Weekly R. 64); 9 L. Times, N. S., 356; seems to establish that he must do this whether he admitted the agreement or denied its validity *in toto*. See 2 Dan. Ch. Pr. 779; Story on Eq. § 755-758; 4 Vesey 23; Slainer v. McDougall, (D. G. & S. 265).

Before finally disposing of this branch of the case, it may be well in so important a matter, even at the risk of being considered tedious, to notice a few of the cases which seem to bear more immediately upon it. Looking as far back as the case of Dufour v. Pereira (1 Dick. 419), we find that though mutual wills are unknown to the law as testamentary instruments by reason of their revocable nature yet "a contract to make mutual wills, if one of the parties has died having made a will according to the agreement, will be decreed in equity to be executed by the surviving party, if he has enjoyed the

benefit of the will of the other party. Lord Camden says it might have been revoked by both parties; it might have been revoked separately, providing the party intending it had given notice to the other of such revocation; but I cannot be of opinion that if either of them, during their joint lives, do it secretly, or, that after the death of either it should be done by the survivor by another will. It is a contract between the parties which cannot be rescinded but by the consent of both. The first that dies carries his part of the contract into effect. Will the Court afterwards permit the other to break the contract? Certainly not; the defendant has taken the benefit of the bequest in his favor of the mutual will, and hath proved it as such; he hath thereby certainly confirmed it, and, therefore, I am of opinion that his last will, so far as it breaks in on the mutual will, is void. And, therefore, having proved the will and enjoyed the benefit thereof, had by those acts bound his assets to make good all his bequests in the mutual will," and, therefore, the necessary accounts were ordered to be taken: This case was cited in Lord Walpole v. Lord Orford (3 Ves. 402), where Lord Loughborough refused to enforce the compact of the mutual will, under the peculiar circumstances of that case, the compact being considered uncertain and, to a certain extent, unfair; but we cannot discover that the principle of the decision has ever been shaken, and it has been adopted by Mr. Justice Story, Eq. 785, and by Mr. Williams, in his work on Executors, and elsewhere, as a recognized doctrine. Passing by other cases bearing more or less on the question, let us come to the more modern cases, and starting from Hammersley v. De Beil (12 Cl. & F. 42), we think the conclusion at which we have arrived will be fully borne out. This case established that a representation made by one party for the purpose of influencing the conduct of another, and acted on by him, will be sufficient to entitle him to the assistance ot a Court of Equity, for the purpose of realising such representation. In this case, in written proposals made in a marriage treaty, the father expressed that he intended to leave his daughter a further sum of £10,000 in his will, to be settled on her and her children, the disposition of which, supposing she had no children, to be prescribed by the will of her father. This was held by the House of Lords to create an obligation, though the proposition was subject to revision, it being held that the power was determined by the acceptance of the intended husband, and the marriage with the father's consent. In Morehouse v. Calvin (21 L. J. N. S., 177 & 782), Hammersley v. De Beil was considered a binding and conclusive decision, and not questioned in the Court of Appeal, but as there was no contract, in fact, to the extent claimed, because the amount the testator intimated he would leave was altogether uncer-

tain, and was to depend entirely on his own will and pleasure, and as the Lords Justices thought there was no contract to give more than £2,000 (unless something which was left entirely to his discretion) by will, but he gave nothing; and the party certainly stated that he had made his will and left his property in a particular way, but he reserved to himself full power to revoke it, and thereupon, the mere expression of such an intention, accompanied by such reservation, was held to amount to no contract. In Maunsell v. White (31 L. & E. 1), in the House of Lords, Lord St. Leonard says: "Was it merely a representation in Hammersley v. De Beil, was it not a proposal with a condition which, being accepted, was equivalent to a contract," and is not this just the case before us? In Maunsell v. White it was held that the letters there relied on did not amount to a contract; but we have principles enunciated which we think bear directly on and should govern this case. Thus we find the Lord Chancellor (Lord Cranworth), "Where a person makes a representation of what he says he has done, or of some independent fact, and makes that representation under circumstances which he must know will be laid before other persons, who are to act on the faith of his representations being true, and who do act on it, equity will bind him by such representations, treating it as a contract. Suppose this gentleman had, on the eve of the marriage, said to the appellant, 'you may safely enter into this marriage for I have executed a deed by which I engage to leave you such and such estates.' If, on the faith of that representations, the nephew had married, the uncle would then have made a representation on which he knew the nephew would act, and it would be a fraud on the nephew or on those who dealt with him and came after him, to set up as an answer, that that was a mere intention which he had entertained at the time. The uncle would, in fact, have made a contract and he would be compelled to make it good, for he would have made a representation with a view to induce others to act upon it, and on the faith of which they had at the moment acted; that would be a representation which, under the circumstances I have stated, would be in fact a contract." And in reference to Hammersley v. De Beil the same learned Judge says: "Thus in Hammersley v. De Beil if Mr. Thomson had said: 'I propose at this moment to pay over £10,000, and at another time, if no unforseen occurrence should take place, to pay £10,000 more,' that would not have been a contract at all, but when he, being the father of the lady, went further and wrote on the occasion of the contract of marriage being entered into, 'I will pay down £10,000, and further, I intend to leave her £10,000 more, which sum is to be settled on her in a particular way, and the person about to marry her is for these reasons to settle £500 a year on her,' and that party did make

settlement and then married the lady, the circumstances then to the words used the character of a contract which equity ound to enforce. A contract cannot be at large; it cannot be teral; it cannot be performed on one side and left unperformed e other. A Court of Equity will not allow that. Am I right ring that that was the principle on which the Conrt of Chanirst, and then this house, acted in Hammersly v. De Beil? Lord gham in express terms states that principle, affirming in that what had been previously stated by the Master of the Rolls. noble and learned Lord (12 Cl. & F. 83), says: 'I am clearly of on with the Master of the Rolls, and I concur in what he states e subject of the letter, subject of course to revision, and which ted by him so clearly, that I prefer his language to my own.' ays most accurately (3 Beav. 478): 'Until Baron de Beil had rmed his part and prior to the marriage the whole was to be ct to revision, but no revision took place. The proposals and tions thus expressed remained without any alteration whatever the time of the marriage, and I am of opinion (in which I en- agree) that the proposals which up to that time had been subo revision, did then by the acceptance of Baron de Beil, by his execution of the required settlement on his part, and by the nization of the marriage with the approbation of Mr. Thomson ne an agreement, which Mr. Thomson was bound, specifically, rform.' That is the principle on which the case of Hammersley Beil was decided. The House of Lords held in that case that rords of the letter was a proposal reduced into writing, the pro- to give, and to intend to give, that that really meant an agree- to this effect. 'If you will settle £500 a year and marry, I give £10,000 now and £10,000 by my will,' and in the same Lord St. Leonard says: 'But when we come to the case of Hamley v. De Beil, decided in this House (12 Cl. & F. 45), and we old we must be governed by it in the decision of the present we look at it and find that there was not merely a representaof what was probable to occur, but that there was on one part posal accompanied with a condition required of the other party, that proposal was accepted, that that condition was complied that there were, therefore, all the requisites of a binding con- ' The next case decided a few months after was Jordan v. ey (31 L. & E. 20), likewise in the House of Lords, and in this was also declared, *dissentiente* Lord St. Leonard, that there was er a legal contract nor a misrepresentation of facts, but only xpression of an intention, the performance of which could not forced. The same learned Lord Chancellor, while holding that Statute of Frauds did not apply to the case, while applying the

doctrine that when neither falsehood nor fraud was intended, but a party has merely misled another, if he believed that the party misled was to act on that misrepresentation that would be sufficient. In Hutton v. Rossiter (31 L. & E. 531), Knight Bruce, L. J., says "The expression of one of the rules belonging to this department of the law which is to be found in Lord Eldon's judgment in the case of Evans v. Bicknell (6 Ves. 183), has been always deemed satisfactory and right." His language is: 'It is a very old head of equity, that if a representation is made to another person going to deal in a matter of interest upon the faith of that representation, the former shall make that representation good if he knows it to be false;' and Turner, L. J., in referring to Jordan v. Money, and stating that that decision turned upon the facts of the case, repeating the last remark of the Lord Chancellor we have just quoted, says: 'Now, I quite adopt that principle and believe it to be consistent with the law of the Court.'"

Next in order is the case of Loffus v. Maw (8 Jur. N. S. 607, 3 Giff, 592), bearing still more directly on the case now before us. There, a testator, when in advanced years and in ill health, induced the plaintiff, a niece, to reside with him and continue valuable services to him, on the faith of his representations that, if she would do so, *he* would leave her, by his will, a life-interest in two freehold houses, and, by a codicil in his will, which was read over and explained to her, trusts were created in her favor. By a subsequent codicil he revoked the disposition in favor of the plaintiff, contained in his second codicil. The Court held the testator could not revoke the trusts, and that there must be a declaration: that it appearing that the plaintiff had been induced to render valuable services to the testator on the faith of his representations, that, by doing so, she would become entitled to the benefit of the trusts created in her favor by the second codicil in his will; the testator had no right to revoke the said trusts, and therefore decreed that the trusts created in favor of plaintiff by the second codicil be performed. Vice-Chancellor Stuart says: "If she can prove, by sufficient evidence, that the testator induced her to continue her valuable services on the faith of his representations that he would leave her the property in question at his death, she is entitled to the assistance of the Court. Lord Cottenham's statement of the doctrine in Hammersley v. De Beil has been repeatedly referred to and acted on in recent cases." And, again, he says: "It has been argued for the defendants that there is no evidence in writing of the representation, except by the codicil itself, which, being a revocable instrument, is not binding; but there is no authority to shew that relief is to be refused unless the representation be in writing. The Statute of Frauds has no ap-

plication to cases of this kind. No doubt there must be the clearest evidence of the representation. Anything vague or indistinct in its nature would prevent the right to relief. But, in the present case, the codicil is produced as evidence in writing of the fact of the representation, and for that purpose it is perfect evidence." So, in the case before us, though B. S. proposed by his will of 1856 to revoke the will of 1841, he refrained from destroying it. And the learned Judge proceeds: "In cases of this kind a representation that the property is to be given by a revocable instrument is binding. It is the law of the Court which makes it binding, although it be of the essence of the representation that the instrument is to be of a revocable nature. No evidence of the representation can well be stronger than the actual preparation and production of the instrument, whether revocable or not. And where the preparation, production and execution of the instrument all take place for the purpose of influencing the conduct of the other party who acts upon it, the principle applies in its full power." And again, "It is the revocation which makes the assistance of this Court necessary in cases of this kind. Where the testator is bound by the effect of his representation, he cannot defeat the right to relief by bequeathing or devising the whole of his property to another person. Whoever claims under the will and codicil takes as a mere volunteer, and cannot escape the effect of any act of the testator, which has bound the property in his lifetime. The testator's representation in this case, and any other case within the application of the doctrine, binds the property which he devised to the plaintiff as completely, according to the law of this Court, as if he had been bound himself in consideration of money not to revoke the gift, and had made the person named in his will a purchaser of the property devised." Following this, are cases as recent as 1865. We name the case of Ridley v. Ridley (34 L. J. N. S. 113, 11 Jur. N. S. 475), which appears to us directly in point. In this case, under the will of G. R., his children were entitled to certain real estate, subject to a mortgage. S. R., brother of G. R., was one of his executors and devisees in trust. He induced the children to convey their interest to his brother and partner, promising, verbally, that if they would accept his proposal and execute the deed, he would bequeath them, by his will, at least as much as they would get under their father's will. The value of G. R.'s estate was ascertained. S. R. died fourteen years after, and repeatedly, at the close of his life, denied the promises, and failed to leave, by his will, a proper equivalent to G. R.'s children. It was established that S. R. was interested in the purchase made by his brother. Being a trustee, he could not appear as a purchaser himself, and it also appeared that the price given was the full and ample

value of the property. It was held that the promise was an obligation by S. R., which could be enforced against his estate; that it was not void for uncertainty; that there was sufficient consideration, and that the promise was not within the 4th section of the Statute of Frauds. As to the Statute of Frauds, Sir J. Romily, M. R., says: "The first objection urged is, that the promise in this case is not in writing. This is, however, not a case which comes within the 4th section of the Statute of Frauds, which enacts (reads sec.) These words have long since been settled not to extend to cases where the accomplishment or performance of the agreement may, by possibility or by accident, be extended beyond the space of one year; but, that the clause is confined to cases where the agreement is not to be performed, and cannot be carried into execution within that space of time." And the costs of all parties were ordered to come out of S. R.'s estate. In addition to these cases, Caton v. Caton (1 Ch. A. L. R. 137), and Patch v. Shaw (7 Jur. N. S. 63), may be cited. On the facts before us, and on principle and authority, we think, in this case, a contract between B. S. and his daughter has been clearly established, which this Court is competent to enforce.

As to the second point. We have carefully examined the evidence and can discover nothing that enables us to say that any contract or arrangement ever was entered into between B. S. and Mrs. Gilpin, by which she accepted any given sum or sums in discharge and satisfaction, or in lieu of the original contract, or that she, in any way as a matter of fact, cancelled it or abandoned her claim thereunder. We do not understand it as being contended that she did this between the date of the deed and August, 1846, when she married Dr. Gilpin. There is, in fact, not a tittle of evidence, direct or indirect, on which to base such a supposition; but it is contended that after her marriage B. S. advanced her, at different times, sums of money which, it is alleged, were on account of her interest in her mother's property and a discharge and satisfaction of the original agreement. But the legal evidence of any arrangement to that effect is wanting, if we except the evidence of the entries in B. Smith's book, against Dr. Gilpin, made by Smith's clerk without the knowledge, assent, or sanction of either Dr. or Mrs. Gilpin, and which was clearly inadmissible, which is put forward in its support. And what remains is vague and meagre and so wholly unsatisfactory that no Court could act on it with any degree of safety, for, in fact, the whole case may be said to rest substantially on the evidence of Mrs. Smith, and her statement as to her recollection of a casual observation in a letter she says she received from Mrs. Gilpin, to the effect that she, Mrs. Gilpin, had received her share of her mother's estate; but this letter was not produced and Mrs. Smith had not seen it for fourteen

's. The greater part of what there is besides this is contradicted, the whole hypothesis is, in our opinion, entirely inconsistent ı the relative position and conduct of the parties and their rights. learly defined by the will and deed. After the 18th October, k, Mrs. Gilpin had no interest in her mother's property to dis- of. The provisions of the will made in 1841, in favor of Mrs. in, remain during her life-time unrevoked, and the codicil of the November, 1852, by which they are revoked, recites the death of Gilpin, leaving the inference that B. Smith assumed that her h gave him the right to revoke, rather than that he had pur- ed from and paid her in her life-time for the right. But when here was this new or substituted contract entered into? Who ested this fresh arrangement? Who were the parties to it? ıt were its specific terms? How was it evidenced as between parties? What declaration, verbal or written, or act, accom- ed by a declaration from B. S. to Mrs. Gilpin, or from Mrs.) B. S., is there to indicate that any such contract or understand- existed? When and in what exact manner did B. S. carry the ement into effect? All or any of these particulars it would be ossible to gather from the evidence. It is manifestly clear from evidence that if such an arrangement was contemplated between mith and Mrs. Gilpin, her husband was no party to it and knew ing about it. Can it be supposed that B. S. would have at- pted to negotiate such an arrangement with Mrs. G. behind the of her husband? Still less probable is it that he would have pleted it without a vestige of evidence of any description to cate its terms, or anything in the shape of a voucher to protect self or his estate after his death. It is a moral duty cast on yone to make provision, according to his means, for his family. and Mrs. Gilpin's letters shew that they were not in what ld be called affluent circumstances; on the contrary, it would ear that it was not always without difficulty they managed neet their current expenses. Dr. Gilpin appears to have been onfidential business communication with Mr. Smith, and to have sacted a good deal of business for him, for which he received emuneration, except on one occasion a trifling present of £10, urchase a book, and £20 when his little boy died. Consid- g Mr. Smith's wealth, the pecuniary position of his daughter her husband, the affection that appears to have uniformly sub- d between Mrs. G. and her father, and the manner in which he led himself of Dr. G's service, what more natural than that out is superabundance he should occasionally assist his daughter ı pecuniary presents? It would appear that he had promised a house and that he would pay her rent until the house was

purchased, a most natural gift for a wealthy parent to make t young couple struggling with a limited income, but which prom were never fulfilled. From the value of this purchase, when ma Dr. G. says, the largest amount ever given, £300, B. S. stipula should be deducted. So far as we can judge from the evidence, sums given cannot be considered extravagant, and if they w coupled, as Dr. G. testifies, with repeated intimations that what so advanced was to be deducted from the share he was to leave M G. of his property, and for doing which he had received a valua consideration, they cannot be characterized as liberal. And any ference that they were received in full discharge of his obliga is further strongly rebutted by his own solemn declaration; fo the 22nd October, 1848, he makes a codicil in which he clearly sh on what terms the advances were made and further advances w be made, and strongly corroborating Dr. Gilpin's testimony. Mrs. Gilpin and M. J. having married and not having received the £1,000 apiece, but having received advances and B. S. being evidently unwilling that they should receive any thing more than their share, as agreed on, he inserts this clause: "And whereas, in and by a clause in my will, provision has been made for the payment of the sum of £1,000 on the marriage of each of my children, C. and M. J., who have since been married, *and who have been and still will be to some extent assisted by me*, it is my will, and I do hereby further direct, that in lieu of the said sums of £1,000 to them respectively, no charges appearing on my books against them, shall be taken into account in setting off their shares under the provisions of my will as allowable deductions from their shares respectively, except such sums as shall exceed the sum of £500 to each of them, which excess shall alone be carried into account against them by my trustee." But whatever B. S. may have contemplated or may possibly have supposed would be the effect of making such advances, it is enough to say that there is no sufficient evidence to establish that Mrs. Gilpin, if competent to do so, ever entered into any agreement to abandon the right she acquired under the original arrangement. Independent of all this, we think Mrs. G., during coverture, could not make a binding agreement to divest herself of her residuary interest in the estate of B. S. The interest of a married woman in real estate cannot, under our law, be conveyed, incumbered, or disposed of, without her consent, testified by her being a party to the instrument conveying the same, duly ackowledged, according to the statute, and whatever doubts may have existed as to the ability of a married woman to assign or release a reversionary interest in personalty, it is now, we think, clearly established that such an interest, not settled to her separate use, is not capable of being barred. Her husban

cannot release her right, nor can he assign it so as to defeat his wife's legal right by survivorship. No doubt there were conflicting decisions on this branch of the law, but the important case of Whittle *v.* Henning, (2 Phil. 731), determined by Lord Cottenham, affirming the order of Lord Langdale, M. R., (11 Beav. 222), overruling Hall *v.* Hugonin, (14 Sim. 595), Creed *v.* Perry, (4 Sim. 592), and Bishop *v.* Colebrook, (16 Sim. 39), appears to have finally determined the matter. In England, the Act 20 & 21 Vict., cap. 57; euables a married woman, after 31st December, 1857, to dispose of any reversionary interest which she may acquire, under any instrument made after that period, in personal estate, by deed to be acknowledged by her as required by 3 & 4 Wm. IV., cap. 47. In Whittle *v.* Henning, a fund in Court was held by trustees in trust for the husband, for life, and after his death for the wife for life, and after the death of the survivor upon trust for their only son absolutely. The husband and son executed a deed, assigning and surrendering their respective shares, in order that by merging the life interest of the wife in the immediate absolute interest, and the life interest of the husband in the interest of the wife, immediately expectant thereupon, the fund might become absolutely vested in the wife, in possession. The husband and wife and son then presented a petition praying that the fund might be transferred to the son, but it was held, dismissing the petition, that the interest of the wife still continued reversionary, and as such, could not be disposed of by the husband and wife. In Osborne *v.* Morgan, (8 L. & E. 192, 9 Hare 432), it was held that a wife's consent could not be taken to waive the right to a reversionary chose in action not reduced into possession. So in two very late cases in Ireland, *in re* Godfrey's Trust, (Ir. Rep. 1 Eq. 531), where a fund in Court was charged with the payment of an annuity to a married woman, the Court refused to order payment out of the fund, on a deed whereby the fund was released from the annuity by the wife and her husband, and reserved a portion of the fund to answer the annuity, should the wife survive her husband. And in Williams *v.* Mayne, (Ir. Rep. 1 Eq. 519, and 16 Weekly R. 173), it was held that a married woman could not bind her right to a reversionary chose in action, and the Court refused to act on her election to take an immediate legacy, instead of her reversionary interest, and ordered the legacy and its dividends to be impounded until she became competent to elect.

As to the 3rd point, Dr. G., one of the defendants, does not pretend to set up any claim as against the plaintiff, and it is clear that, as his wife did not survive B. S., he took nothing by the will. The shares of the daughters were to be invested, and the annual proceeds of such shares were to be paid to them respectively during their

natural lives, and after the death of each daughter respectively, share is to be equally divided among her children, to the sons twenty-one and to the daughters at eighteen, or on being mar and each child is to be entitled to the annual income of its respec share until the principal is paid, and if any daughter should without leaving any child, then the share of such daughter s be equally divided among his other children, and shall form pa their respective shares, &c. And if any of his children should leaving a child or children, such child or children shall represent parent in any division of the property which may thereafter place, according to the provisions of the will, the share of the pa being equally divided among such children, if more than one, a the share of each son to be paid at twenty-one, and of each daug ht at eighteen, or marriage, and each child shall be entitled to th annual income of its respective share until the principal is paid And the will contains a rule for its construction as to the provisions for the children or the grandchildren, declaring that the amounts to be paid at twenty-one, or eighteen, or marriage, respectively, shall not be deemed to have vested or to have become a vested interest, until the time of payment. It has been argued that on the death of Mrs. G. her interest became vested in her husband, and that he or her administrator should now put forward the claim. We have failed to discover any principle to justify this construction or to see the application of the cases cited in its support. The agreement was, in our opinion, a disposition by B. S. of a share of his estate in favor of Mrs. Gilpin, to inure to the benefit of her and her children, to herself for life, should she survive B. S., and after her death, to her child or children. And if she died before B. S., then her children were "to represent the parent," and to be entitled to the annual income, if sons, until twenty-one, if daughters, until married or arriving at the age of eighteen. Having established that there was a contract between Benjamin Smith and Charlotte Gilpin, we think the fair construction of that contract is, that the whole disposition, as set forth in the will, and referred to in the deed incorporated in it, must be read as one disposition, and the compact then amounts to this: In consideration of receiving your property, I make this disposition of mine: You shall have a certain share of it, not absolutely, but to be enjoyed by you and your children in a particular manner, that is, if you survive me you shall enjoy the annual income during your life, and on your death, it shall go to your children in a certain specified manner. If you die before me, your children shall be substituted for you, and they shall, if under certain ages, have the annual proceeds or income, and ultimately, on attaining the specified ages, respectively, receive the whole. But if you and your

n die, so as to prevent this provision being carried out as pro-
then it shall form part of my estate, but under no other cir-
nces have I any disposing power over it. We do not think
intended that B. S., if the daughters died before him, leaving
n, was to get their property for nothing, but in such an event,
nk the provision was to inure to the benefit of their children,
terms stipulated. We think this is just one of these obliga-
here a right may be acquired by a third party, who is not a
o the contract, that there is in this case a clear *jus quæsitum*
and Lord Wensleydale, in Pidder *v.* Brown (3 MacQ. H. of L.
5, 3 Jur. N. S. 855). says: "The meaning of the *jus quæsitum*
s whether the party be named or not, if there is a contract
or his benefit, in that case the contract may be enforced by
nd the Lord Chancellor says: "It must not only be a *jus tertio*
jus quæsitum tertio; it must be something that was intended
benefit of the person." The objections of a technical charac-
t were raised are, we think, easily disposed of. The first was
e trustees in the will of 1841 should have been made parties.
mple answer to this is that inasmuch as B. S. had a right to
the will, though bound to fulfil his contract, those in whose
he has placed his estate may be called on, and are the persons
ught to be called on to execute the trust. Again it is urged
e *cestui que trusts* under the last will should have been made
, but rule 9 of sec. 19 of 17 Vict., cap. 18, an Act relating to
l procedure in equity, meets this objection. It is alleged that
ff should have disclaimed his interest under the last will be-
claimed under the first. We cannot see that any doctrine of
n arises as the case now stands. No such defence is set up by
swer or in the evidence. The plaintiff, an infant, by his next
, seeks, by this bill, the performance of a contract made for his
t. There is no allegation in any part of these proceedings that
s claimed under the last will, nor does it appear that he has
or if, as an infant, he could do so, does it appear whether he
sclaimed or not: these questions are not raised by the bill and
r or evidence. Should plaintiff hereafter advance such a claim,
ndent of and in addition to his rights, under this contract, it
for the trustees, or parties interested, under the last will, to
ith it as they may be advised; it is not for us to anticipate,
ss to adjudicate, on a matter not before us. It is likewise
d that no contract is set out in the bill, and that plaintiff's
not sufficiently set forth to entitle him to recover. The plain-
ase might possibly have been set out with a little more legal
cy and critical nicety, but we think sufficient is set forth on
e of the bill to enable the Court to make a decree. We have

all the necessary and material facts put forward, and the 2nd chap— ter of the Provincial Act, regulating the general procedure in equity— y by section 4, gives a short form of the bill to be filed by plaintiffs— s, and enacts that the plaintiff shall file a bill similar to the said form— m, with such variations as each case may require, which shall contain— a brief narrative of the material facts on which the plaintiff relies— s, numbering each allegation, as in the said form, adhering as near as— as may be to the brevity of such form, and concluding with a prayer— er for a specific relief, under which, without a prayer for general relief— f, he shall have any other relief to which the equities of his case may— y entitle him.

Again it is objected that Mrs. Ruel was a necessary party to the— he suit, but rule 4 of 17 Vict., cap. 18, c. 2 sec. 19, answers this: "Any— y one of several persons for whom a trust is held under any deed— or instrument, may, without including any other such persons, have— a decree for the execution of the trusts in the deed or instrument— t." Another objection is that the Court cannot enforce the agreement— because the time has not arrived at which plaintiff would be entitled— to have the whole benefit, such being dependent on his attaining— twenty-one years. If plaintiff is entitled to the provision contained— in the will, he is to have the income during his minority, and— on attaining his majority he is to have the principal. If he dies before— attaining twenty-one the principal is otherwise disposed of. If this— Court could, on plaintiff's attaining twenty-one, decree him the principal, why can it not while he is under twenty-one years give him— the benefit of the provision, and decree what the provision gives— him until twenty-one, the income? Why should the trustees— be bound to account for the principal and be beyond the reach of— the law as to the income? If plaintiff has a remedy for the principal— at twenty-one, why is he remediless as regards the income during— his minority? If there is any thing in the objection we must— confess our inability to comprehend it.

Why Mr. Smith changed his mind, and why, instead of an equal— division among all his children, as his first will so fairly contemplated, he subsequently attempted to give the lion's share to— the children of the last, and left those of the previous marriage— little better (considering the amount of his wealth) than a miserable— pittance, is not disclosed, and it would be as much out of place— as it would be useless for us to speculate as to the influences that— may have operated to produce that result. If he had been content— with the interest the law gave him in his first wife's estate, and if he— had allowed his other children to retain their interest therein, and— left himself free from any contract with them, however illiberal or— unjust, these children or outsiders might have considered the provisions

of his last will; it would have been a disposition of his property that no one could have disturbed. But if he would take from these children their little all, on condition that they should have an equal share with his other children, in his estate at his death, whatever that estate might then be, it must be a satisfaction to all disinterested parties, that equity is not so one-sided as to be unwilling, or the arm of the law so weak as to be unable, to enforce the righteous performance of a fair bargain, and prevent the scandal of the successful perpetration of a gross act of injustice.

This appeal must be dismissed, and with costs. After reading the defendant's answer, particularly the 12th paragraph, in the absence of any reasonable evidence in its support, and considering, in connection with that answer, the character of the last class of objections urged against the decree on this appeal, we have not without difficulty brought our minds to the conclusion that these defendants, excepting Dr. Gilpin and S. J. Scovil, should not be decreed personally to pay these costs. But, as what they have done was in the interests of their *cestui que trusts*, and most probably at their instance, the Court directs that the costs of the plaintiff and of Dr. Gilpin (S. J. Scovil has incnrred none) shall be borne out of the residue of the estate of B. Smith, but no part of the same shall be deducted from the shares of the said Charlotte Gilpin or interfere with any right of Martha J. Ruel, in said estate. This is in accordance with the authorities and with the opinion expressed by the Lord Chancellor in Caten *v.* Caten, (1 L. R. Ch. App. 149): "That costs are not directed to be paid as a punishment, but that having been caused by the conduct of the losing party (and we may add, or those whom they represent) they ought to be borne by those who have occasioned them.

Appeal dismissed.

PECK *v.* TINGLEY.

FEBRUARY 5, 1869.

In an action by an attorney to recover the amount of a bill of costs incurred in defending defendant against a criminal charge, the bill had been taxed by the clerk, who taxed only such items as the ordinance of fees provided for, and refused to recognize or touch the other items.

Held, That the jury were bound by the clerk's taxation as to the taxable items, and as to the others they might find for the plaintiff for such services as were in the nature of attorney's work, but that plaintive could not recover for counsel fees.

***Quære*, Whether, if the clerk had followed the English practice and taxed the whole bill, it would have been sustained?**

This was an action to recover for services rendered to defendant by plaintiff as attorney and counsel in connection with his defence

against a charge of murder. At the trial before RITCHIE, C. J., the Westmorland Circuit in January, 1868, it appeared that t items of the account for which the action was brought had been forth in a bill of costs which was taxed by the clerk under a Judg order. Several of those items were for services not provided for the ordinance of fees, and those items the clerk had refused to t or exercise any jurisdiction over, or consider in any way, and tax only those items provided for in the ordinance. Evidence was go into on the part of the plaintiff to prove that the services not reco nized by the clerk had been performed, and what the value of th services was. On the part of the defendant it was contended th the plaintiff could only recover for the items taxed by the cle that some of the charges were in the nature of counsel fees could not be recovered for; that others were not performed at al were not worth the amount charged, and that some of them been performed on the understanding that they were not to charged for. The learned Chief Justice submitted these questi of conflicting evidence to the jury, pointing out to them the na and character of attorney's work and what should be considere the nature of counsel business, directing them that plaintiff c not recover for the latter. That they were to be bound by the cl taxation in regard to those items which were of a taxable char and on which he had adjudicated, and as to the other items i nature of attorney's work he left it to them to find whether th vices charged for had been performed and what was their v The jury rejected some of the items under his Honor's rulin being in the nature of counsel fees, but found for the plainti others not provided for in the ordinance of fees, and the am that plaintiff was entitled to recover for such services.

A. L. Palmer, Q. C., in Hilary Term last, obtained a rule *nisi* for a new trial on the ground of misdirection. He contended that the plaintiff could only recover the items within the ordinance and allowed by law, and that the plaintiff had improperly recovered for certain fees as attorney's fees which were charged in the bill of particulars as services as junior counsel.

Wetmore, Attorney General, showed cause in Trinity. I do not apprehend that a party is estopped by his bill of particulars, for he is entitled to amend them, and if the plaintiff is entitled to recover for those services as attorney, the fact of their being charged for as services as junior counsel will not estop him. [RITCHIE, C.J.: I did not think that there was any thing to mislead in the bill of particulars.] It was contended broadly that no attorney could recover any thing except what was provided for in the ordinance.

and that the bill of costs being taxed by the clerk was conclusive. It may be conclusive as far as it relates to taxable items, but no further. It cannot be contended that he is estopped by the taxation of the clerk in regard to the items which the clerk had no power to tax, and did not tax, and when the jury have found that those services were performed he is entitled to recover for them. Those items are on the Crown side of the Court, and if taxed on the Plea side that cannot constitute an estoppel. If taxation by the clerk would estop it should be the clerk on the proper side of the Court. Wardle *v.* Nicholson, (4 B. & Ad. 475).

A. L. Palmer, Q. C., contra. It is not merely a question of amending a bill of particulars, for the attorney has by law to render his bill of costs and cannot amend it. It has been decided that the Statute of 22 and 23 Car. II., cap. 9, is in force in this Province, requiring the bill to be rendered before action brought. This is merely a question in regard to recovering an item in a bill which they say they have delivered according to law, but which they have not delivered. If a bill is delivered for items which are not recoverable by law, the party is not required to disprove it. Macarthy *v.* Smith, (8 Bing, 145), shews that a party is confined to his bill of particulars. I contend that after delivery of the bill of costs, the party has a right to have his bill taxed and settled without the intervention of a jury. In England if there are taxable items in a bill they draw after them the whole bill. Hooper *v.* Till, (Doug. 199); Wilson *v.* Guttridge, (4 D. & R. 736). [RITCHIE, C. J.: I do not think this case is arguable on English precedents where the whole system of taxation is so different.] The Attorney General is wrong in contending that this bill was improperly taxed because it was not taxed on the Crown side of the Court, Tidd's Prac. 330, shews that is not so. And the case of Wardle *v.* Nicholson, cited by him, so far from being against me bears out my argument. The attorney was only entitled to recover for the items provided for and recognized by the ordinance of fees.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

The clerk reports to us that it has never been the practice in the clerk's office of this Court, since he has held the office, now seventeen years, nor that he is aware of in the time of his predecessors, to tax any items except such as are allowed in the ordinance of fees and which apply exclusively to actions on the Civil side of the Court, and not to services performed by attorneys where there is no cause in court. And the clerk likewise reports to us, that in accord-

ance with such practice he refused to tax for the services claimed in this case, not because the services were not rendered or the charges unreasonable, but because the charges were for services not recognized in or provided for by the ordinance, he absolutely refused to take them into consideration, or to exercise any judgment on or jurisdiction whatever over them. The Chief Justice at the trial directed the jury to be bound by the clerk's taxation as to those items which were of a taxable character and upon which he had adjudicated; and as to the other items, he left the question not only as to the performance of the work, but as to the value of the services, &c., to the jury, distinctly pointing out to them the nature and character of attorneys' work and what should be considered in the nature of counsel business or fees, directing them as to the latter that plaintiff could not recover, however valuable his services may have been, or however ungracious they might consider defendant's conduct in resisting their payment. The jury rejected a certain portion of the claim and found that certain services were performed by plaintiff as attorney for defendant, and found the amount the plaintiff was entitled to for such services, and we are of opinion they were in the nature of services as attorney or agent, and wholly distinguishable from, and not in any way in the nature of, counsel fees. Had the clerk in this case acted on a principle or practice which has prevailed in England, viz: that where there are taxable and non-taxable items in a bill, the taxable items draw after them as it were the other charges, and if the whole bill be referred to the master he may tax all the items in it, we will not say what the effect might have been whether the practice, certainly novel in this Province, should be sustained or whether the plaintiff, if dissatisfied with the clerk's proceedings, should not have got rid of the taxation, if wrong by motion; but as the clerk, for the reasons before set forth, wholly declined to tax the non-taxable items, if defendant wished to bind plaintiff by a taxation of such items, he should have applied to the Court to compel the clerk, by a peremptory order, to proceed with the taxation, and deal with the items as taxable items, and this would have fairly brought up the question as to how far the English rule has prevailed or ought to prevail in this Province. As the case stood at the trial, there were items taxed, and plaintiff was held bound by such taxation; there were other items not taxed which plaintiff was compelled to sustain by evidence, and which defendant endeavored to meet in a variety of ways, as that some of them were in the nature of counsel fees or for services rendered by plaintiff not as an attorney but as a barrister; that others of the services were not performed at all, or were not worth the amount charged, or were performed gratuitously or on the understanding that no charge was to be made for them,

All these matters were submitted in the largest manner to the jury, and we do not see how a judge could have properly otherwise dealt with the case; to bind plaintiff by a taxation, when in reality there was no taxation, would have been manifestly unjust. The jury passed on them and we should be doing a gross act of injustice, under the peculiar circumstances of this case, if we interefered with their verdict. We entirely repudiate as utterly untenable the extraordinary doctrine put forward by defendant's counsel that no attorney in this Province can legally recover for any services, whatever, rendered to his client except what are provided for in the ordinance. The proposition seems to us too absurd to require more than this passing notice.

DALTON *et al.* v. HAMILTON.

FEBRUARY 9, 1869.

D, a plumber, working on defendant's house, addressed to him a memorandum stating that he would require to send to plaintiffs in Boston for certain articles specified, which defendant gave to T, an expressman, who handed it to plaintiffs. Plaintiffs treated it as an order from D, with whom they had dealings, and sent the goods and invoice to him by T, but D refused to receive them. T then delivered them to defendant who paid T for them and took his receipt. Plaintiffs remaining ignorant of this transaction demanded payment of D, which he refused.

Held, 1.—That by bringing *assumpsit* for goods sold and delivered against defendant they waived the tort, ratified the sale by T., and treated him as their agent and payment to him discharged defendant.

2.—That the plaintiff might have maintained trover against the defendant for wrongful conversion.

Assumpsit for goods sold and delivered, tried before Wilmot, J., at the last St. John May Circuit. Dyall, a gasfitter, was working on defendant's house, and certain articles being required for the work, he gave defendant the following memorandum:—

You will require to send to Messrs. Dalton & Ingersoll, No. 19 Union Street, Boston, Mass., for the following goods for bath room. *(Goods described).*

(Signed) JAMES DYALL.

This paper was addressed to defendant, but when produced at the trial defendant's name had been torn off though it did not appear by whom. Defendant gave this memorandum to one Turner, who took it to plaintiffs, and they allege they supposed it to be an order from Dyall who was a customer, and treated it as such, forwarding the goods named in the memorandum to Dyall, by Turner, and sending him, also, an invoice of the goods in his name. Dyall refused to receive the goods and repudiated all connection with them. Turner

then took them to defendant, and afterwards, obtaining the invoice from Dyall, obtained payment from defendant of the amount and gave him a receipt. When the time arrived when, in the usual course of business, the plaintiffs were in the habit of settling accounts with Dyall, they called on him for payment but he repudiated the liability. They pressed their claim and refused to consider defendant as their debtor, but subsequently finding that they had mistaken Dyall's position, that he was not liable, and Turner, being unable to pay, they called on defendant, who likewise repudiated any liability, alleging his dealing to have been with Turner and that he had paid him, whereupon the present action was brought and a verdict found for defendant.

C. W. Weldon, in Trinity Term last, obtained a rule *nisi* for a new trial, contending that the defendant having put the paper signed by Dyall into the hands of Turner, enabled him to commit a fraud on plaintiff, and he was therefore liable, Heald *v.* Kenworthy (10 Ex. 739), and that by giving the paper to Turner, he made him his agent.

Wetmore, Attorney General, shewed cause in Michaelmas Term. The paper placed in Turner's hands was merely a direction where he was to get the goods and what goods he was to get. There is no evidence to shew that Turner became in any way defendant's agent. Plaintiff testifies that he believed at the time that he was selling the goods to Dyall, and if, with the full knowledge of the facts, the plaintiff elected to consider Dyall as his debtor, I contend that he discharged the others. Defendant was not known in the transaction. He gave Turner no authority to pledge his credit, and the plaintiff still claimed from Dyall after he knew Hamilton had got the goods. Turner never was the agent of defendant to pledge his credit. If he was an agent at all, he was only an agent for the purpose of getting the goods, and if an agent exceeds his authority the principal is not bound, 1 Parsons on Con. 40, 43. There is no case where a liability can be afterwards created where no authority has been originally given to pledge credit, Thomson *v.* Davenport (9 B. and C. 86), shews that an agent is liable at the option of the party contracting with him if he do not state the name of the principal. The plaintiff here opened his case on the agency of Turner, he must establish it and he has not done so. In Paterson *v.* Gandasequi (15 East. 86) Lord Ellenborough says: "I do not find a case which decides that where a person sells goods to an agent with the knowledge of his principal at the time, and gives credit to the agent, he can recover against the principal."

C. W. Weldon, contra. The very fact of there being an und

losed principal is the ground on which we must recover. The paper ras addressed to defendant by Dyall, he gave it to Turner who goes ɔ plaintiff to purchase without the money, and the principle is, that : an agent goes to buy without money he goes authorized to pledge ne credit of the principal. Turner buys from plaintiff, who believes e is selling to Dyall, and gives three months' credit; defendant then ays Turner who gives a false receipt. This is just the case of Kaye . Brett (5 Exch. 269). The man who trusted Turner was defendnt and he made him his agent. [RITCHIE, C. J.: Who did the laintiffs trust?] They trusted Dyall. [RITCHIE, C. J.: They had no ight to do so; ought they not now to look to Turner?] If they ave the credit to Turner he was merely an agent, and in the meanime if defendant prematurely pays the money to his agent he does t at his own risk. This is similar to the case of Heald *v.* Kenworthy 10 Ex. 732), which was a case of premature payment. The means f enabling Turner to commit the fraud was put in motion by deendant.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

Dyall, a gasfitter, was working for defendant, and certain articles were required for the work. Dyall had previously had dealings with plaintiffs, and advised defendant to send to them by the express nan for the goods. Dyall gave defendant a memorandum, addressed o him, but when produced at the trial the address was torn off, by whom, or at what time, does not appear. It is as follows:—

You will require to send to Messrs. Dalton & Ingersoll, No. 19 Union street, Boson, Mass., for the following goods for bath-room. *(Goods described.)*

(Signed) JAMES DYALL, *Gasfitter.*

This paper defendant gave to Turner, the express man, with instructions to get the goods. Turner took the paper to Dalton & Ingersoll, who, as they allege, supposing it was an order from Dyall, and believing they were dealing with him as an old customer, delivered to Turner the goods, addressed to Dyall to be delivered to him in St. John. Ingersoll says: "I had no idea that Turner was connected with the business at all, except to bring the order and carry back the goods." They made out an invoice in Dyall's name, which they transmitted to him. They had no knowledge of defendant they say in the transaction. As to defendant, Dalton says: "In March, 1866, I did not know the defendant at all." They sold the goods as they supposed to Dyall, and on his credit alone. Dalton says: "I did not sell these goods to Turner most emphatically." They would not have trusted Turner. As to Turner, Dalton says: "We would not

have trusted him with a dollar; we would not have trusted him with goods to carry down on our own account." The goods were brought to St. John, by Turner's express, and sent by Turner to Dyall, who refused to receive them, disclaiming all connection with them. Turner then delivered the goods to defendant, and having obtained from Dyall the invoice produced it to defendant, who paid him the amount and took his receipt for the same on the invoice. Dalton & Ingersoll continued ignorant of this proceeding, and when the period arrived at which the credit, usually given by them to Dyall in their dealings, expired, or rather the period having arrived when they were in the habit of settling accounts with Dyall, called on him for payment, but he immediately repudiated any liability whatever in the transaction. They pressed their claim on him, and refused to recognize defendant as their debtor after being informed that the goods had been got for and were received by him. Finding that they had mistaken Dyall's position and that he was not liable, and Turner being, as it is alleged, unable to pay, they called on defendant, who likewise repudiated any liability, alleging his dealing to have been with Turner alone, whom he had paid. The present action of *assumpsit* was in consequence brought against defendant, and the question now is, whether on this state of facts plaintiffs can recover the amount of the invoice in an action of *assumpsit* against defendant as for goods sold and delivered, or whether the defendant cannot set up the payment to Turner as an answer.

It is important to notice that plaintiffs unequivocally ignore any sale to Turner at all. They say they sold, or suppose they were selling, to Dyall, an old customer, on a written order from him, that they gave the credit to him and to him alone; that they sent the goods by Turner's express to be delivered to him and to him alone; that they would not have trusted Turner, and of defendant they knew nothing at all, and therefore could not have trusted him. It is clear that as to Dyall they labored under a mistake; they misapprehended the purport of the paper inasmuch as it was no order from Dyall to them, and he neither said nor did any thing whereby he contracted with, or incurred any liability to, them. When, therefore, the goods reached St. John and Dyall refused to receive them or to assume any responsibility or liabilty in the matter, the sale to him that plaintiffs supposed they had made turned out a nullity for want of a contract, and there being no sale the property in the goods necessarily remained in plaintiffs, and under such circumstances Turner should have returned the goods to them or have held them subject to their orders. There is nothing whatever to shew that plaintiffs allowed Turner to hold himself out as agent for them, or authorized him as an apparent principal to sell the goods and receive

payment for them. On the contrary, the goods were packed and addressed to Dyall, and the account or invoice which defendant subsequently paid Turner was made out against Dyall and not to him, and there can be no doubt on the facts before us that Dyall was the only person they dealt with, or knew, in the transaction of the supposed sale, and that Turner, as far as they were concerned, was merely the expressman to carry the order as they supposed coming from Dyall, and deliver it to plaintiffs, and to receive the goods and carry and deliver them to Dyall. That Turner was no party, as principal or agent, to any contract with reference to the goods, and had no interest in, or control over, them beyond that of a common carrier, and therefore he had no right to dispose of them, except as plaintiffs might direct him. They gave him no directions or authority. But finding Dyall would not receive the goods, he, without communicating with plaintiffs, and without their sanction, delivered them to defendant as a purchaser, and a short time after produced the Dyall invoice and received from defendant the amount. In so acting with the goods, under the circumstances, he clearly became a wrongdoer, and defendant also by receiving the goods became a wrongdoer, for it is clear if Turner had no right to sell or deliver the goods to defendant he could vest no property in them in defendant, nor could he, by any act of his, divest plaintiffs of their property in them; and, therefore, there can be no doubt plaintiffs might have proceeded against Turner or defendant or both in an action of trover, for a wrongful conversion in which the payment to Turner by defendant, could not have formed an element of defence for either. The case would in principle have been very like Hardman *v.* Booth, (9 Jur. N. S. 81), where plaintiff, the owner of goods, delivered them on credit on a supposed contract of sale to Edward Gandell, professing to act for Gandell & Co., (Thomas Gandell), packers, but in reality intending to appropriate them fraudulently to himself and Todd, partners in a business of a different kind. Edward Gandell having received the goods, handed them to the defendant, an auctioneer, who made advances upon them in good faith, and sold them to repay himself before notice. Held that he was liable in trover to the plaintiff. This case just turned on the point that there was no sale to Gandell & Todd. The sale was meant as a sale to Gandell & Co.; there was, therefore, no contract of sale, and, therefore, plaintiffs were not divested of their property. But defendant is not sued as a wrongdoer. He is sued in *assumpsit* on a contract between plaintiffs and himself, plaintiffs alleging that they sold and delivered defendant the goods in question, &c. Plaintiffs, as we have seen, say they did not deal with defendant, and did not credit him, and did not authorize the goods to be sold or delivered to him, and so much

that they repudiated his liability to them after being informed that the goods had been delivered to him, and defendant alleges that he dealt only with Turner. When, then, did defendant buy from plaintiffs, or the plaintiffs sell to defendant the goods, so as to establish the contract on which they have sued? The only possible way that a contract can be made out between plaintiffs and defendant, on plaintiffs own shewing, is through Turner, and then only by plaintiffs adopting and ratifying the acts of Turner, and treating the delivery by him, to defendant, as a sale made by Turner as their agent, and on their behalf to defendant. Such a ratification would, no doubt, have a retrospective operation according to the maxim *omnis ratihabitio retrotrahitur et mandato priori æquiparatur*, and, therefore, if goods are wrongfully taken and sold the owner may either bring trover against the wrongdoer, or may elect to consider him as his agent, may adopt the sale and may maintain an action for the price. But the difficulty arises in this case, can plaintiffs adopt one part alone of the transaction between Turner and defendant, in opposition to the general rule that a party cannot confirm a transaction in part, and repudiate it as to the rest, but must adopt all or none; and therefore in this case if plaintiffs adopt the sale and delivery to defendant by Turner, must they not adopt as part of the same transaction the payment by defendant to Turner? If they adopt Turner as their agent on their behalf, must they not adopt him throughout, and as Lord Ellenborough says, take his agency *cum onere*. See Hovil v. Pack, (7 East 166), in other words giving the defendant the same equities againt plaintiffs which they and which he could have had against Turner. Rolfe, B., in delivering judgment in Bird v. Brown, (4 Ex. 788), says, the doctrine of "omnis ratihabitio retrotrahitur et mandato æquiparatur," is one intelligible in principle and easy in its applications when applied to cases of contract. If A. B., unauthorized by me, makes a contract on my behalf with J. S., which I afterwards recognize and adopt, there is no difficulty in dealing with it as having been originally made by my authority. J. S. entered into the contract on the understanding that he was dealing with me; and when I afterwards agreed to admit that such was the case, J. S. is precisely in the condition in which he meant to be; or if he did not believe A. B. to be acting for me, his condition is not altered by my adoption of the agency, for he may sue A. B., as principal, at his option, and has the same equities against me if I sue which he would have had against A. B. Thus in Smith v. Hodson (4 T. R. 211), where a bankrupt on the eve of his bankruptcy fraudulently delivered goods to one of his creditors, it was held that the assignees might disaffirm the contract and recover the value of the goods in trover, but if they brought *assumpsit*, they affirmed the

.ct, and then the creditor might set off his debt. Lord Kenyon
· If trover had been brought the defendant would have had no
:e. * * * * * But this is an action on
ntract for the goods sold by the bankrupt, and although the
ees may either affirm or disaffirm the contract of the bankrupt,
they do affirm it, they must act consistently throughout. They
t, as has been often said in cases of this kind, blow hot and
:old, and as the assignees in this case treated this transaction
ontract of sale it must be pursued through all its consequences,
: which is, that the party buying may set up the same defence
action brought by the assignees which he might have used
it the bankrupt himself, and consequently may set off another
which was owing from the bankrupt to him. This doctrine is
recognized in Hitchin v. Campbell, (2 Bl. R. 827), and in King
th, (2 T. R. 141). Now here the assignees by bringing this
on the contract recognize the act of the bankrupt, and must
ınd by the transaction in the same manner as the bankrupt
lf would have been; and if he had brought the action the
account must have been settled, and the defendant would have
t to set off the amount of the bill. Therefore on the distinc-
oetween the actions of trover and *assumpsit*, we are all of
n that a judgment of nonsuit must be entered." So also in
:r v. Sparrow, (7 B. & C. 310), Bayley, J., says: "The defend-
ı the first instance was a wrongdoer and the plaintiffs might
treated him as such; but it was competent for them in their
:ter of assignees to treat him as a wrongdoer and disaffirm his
or to affirm his acts and treat him as their agent, and if they
affirmed his acts and treated him as their agent, they cannot
vards treat him as a wrongdoer, nor can they affim his acts in
.nd avoid them as to the rest."
m these cases then, and on principle, we cannot arrive at any
conclusion than that as plaintiffs have elected to proceed in
ıpsit they thereby set up Turner as their agent, to make the
o defendant, and they cannot deny his right to receive for them
ayment; that having waived the tort and thus adopted the
hey must adopt the whole transaction and rely on their remedy
st Tnrner for the money had and received by him to their use.

Rule discharged.

McNICHOL *v.* PECK.

FEBRUARY 9, 1869.

Where a contract was made to load a ship for $1.60 per standard by the lump, and part of the load was brought alongside in wood boats, the contract was held not affected by a custom of the port of St. John, that in such cases the amount of the scowage went to the shipper.

Assumpsit for work and labor, tried before WELDON, J., at the St. John Circuit in May last. The defendant was master of the ship "Bayswater," and contracted with the plaintiff, a stevedore, to pay him $1.60 per standard, by the lump, for loading the vessel with deals. When the work was done, plaintiff rendered an account, amounting to $646.10, which the defendant admitted was all right; and payments were made which left a balance of $204 due, which defendant's agent promised to pay. For the defence, evidence was given to show that a portion of the deals had been delivered alongside the vessel in wood boats by the shipper, in consequence of which the stevedore was saved the expense of scowage, and that by the custom of the port of St. John, when that was the case, the shipper was entitled to receive from the vessel seventy-five cents per M., the price paid for scowage, and it was contended that the plaintiff was only entitled to be paid at the rate of $1.60 per standard for the deals delivered on board from scows.

The learned Judge directed the jury that the contract made between plaintiff and defendant was indivisible, and that it could not be cut down by any evidence of custom; and that the plaintiff, having performed his contract, was entitled to a verdict, which the jury found accordingly.

S. R. Thomson, Q. C., in Trinity Term last, obtained a rule *nisi* for a new trial on the ground of misdirection.

Wetmore, Attorney General, shewed cause in Michaelmas Term, contending that no custom of the port of St. John could interfere with the specific agreement made between the parties, and that no evidence of custom was any defence to the action.

S. R. Thomson, Q. C. The custom is a reasonable one, and has existed ever since wood boats were first used here. We proved that if the amount of the scowage was deducted from the account, on these deals delivered in wood boats, the plaintiff had been overpaid; and it appears to me hard if a man can recover for work which he did not do. [RITCHIE, C. J.: The defendant has had all the work done for him that he required, why, then, should he not pay accord-

ing to the terms of his contract, and if any third party has a claim against plaintiff, why does he not bring it?]

Cur. adv. vult.

RITCHIE, C. J., now deliverered the judgment of the Court.

In this case Burns, the agent for the defendant, the master of the ship "Bayswater," proved a contract between the plaintiff and defendant, by which the plaintiff agreed to load the ship for $1.60 per standard by the lump; he also proved that an account was rendered by the plaintiff against the defendant for the work amounting to $646.10, which the witness exhibited to the defendant, who admitted that it was all right. Burns, as the defendant's agent, had made payment to the plaintiff on account, leaving a balance of $204 due; he told the defendant this amount was due the plaintiff, and showed him the account, and defendant said it was all right. Burns told the plaintiff he would pay this balance, but as the bank was closed for that day he directed the plaintiff to call on him in the morning. The plaintiff did not call till the afternoon, when Burns told him that a claim had been made for scowage, and that he could not pay the account till he saw the the captain (the defendant). When the captain afterwards saw Burns he said he had nothing to do with the scowage and that the plaintiff ought to be paid. The reason the plaintiff was not paid was in consequence of a claim put in for the scowage by the shippers, who requested Burns not to pay, and indemnified the defendant against loss in case he should be sued.

In this case we think no question of custom or, more properly, usage of trade arises. The agent of defendant proves that he made a contract with plaintiff to stow the cargo in lump at $1.60 a standard; he admits the work was performed according to contract, and that after the work was done an account was rendered by plaintiff to him, which he exhibited to defendant, who admitted it was all right. The contract, as proved, was in terms one and indivisible, and so treated by the parties to it. Payments were made on account by the agent, and defendant was willing and desirous to pay the balance and directed the agent to do it, but certain third parties indemnified tbe agent against paying plaintiff with a view of raising the question as to the usage of the port to show that plaintiff should not receive the amount claimed, but that the shippers of the cargo should have an allowance by reason of certain portions of the cargo being delivered alongside in woodboats. We think we must determine this case on the contract made between the parties. The agent of the defendant and the defendant admit the contract made without reference to any such allowance, and that plaintiff performed his contract as entered into and that the amount claimed is due him,

We have only to deal with the parties to the contract, and if the agent and his principal admit plaintiff performed his contract, the amount of his claim we cannot gainsay. If these third parties have done any thing whereby either plaintiff or defendant has been benefitted, and they have done it under such circumstances as would give them a legal claim upon either party, they must seek their remedy by due course of law. They cannot, by intervening between plaintiff and defendant by indemnity, affect the legal rights of either of these contracting parties as between themselves.

DOE ex dem. GRANT v. BOYNE

FEBRUARY 19, 1869.

It is no objection to the sheriff summoning or the jury serving, that the sheriff and jury were corporators of the city of St. John and that the action was based, and the land in dispute was, upon a lease made by the Mayor, Aldermen, and Commonalty of the city of St. John, in which they had a reversionary interest, it not appearing that they had any interest in the suit.

In ejectment before ALLEN, J., at the St. John January Circuit last, the lessors of the plaintiff were about to claim title under a lease made by the mayor, aldermen, and commonalty of the city of St. John, to the late James Reed, who had devised the premises to Jane Grant, one of the lessors of the plaintiff. The defendants' counsel challenged the array of the jury on the grounds set forth in the judgment and upon demurrer the challenge was overruled, the cause proceeded and the lessors of the plaintiff had verdict.

In this term *S. R. Thomson*, Q. C., moved to set aside the verdict on the grounds stated in the challenge.

Cur. adv. vult.

ALLEN, J., now delivered the judgment of the Court.*

We think the challenge in this case was properly overruled.

The grounds of challenge were:

1. That the sheriff who summoned the jury was a corporator of the city of St. John, and that the action was based upon a lease made by the mayor, aldermen, &c., of St. John, to the lessors of the plaintiff.

2. That the land in dispute was property in which the said mayor, &c., had, or claimed to have, a reversionary interest.

*Ritchie, C. J., and Weldon, J., took no part.

3. That the jury summoned to try the cause were corporators of of the corporation of St. John.

It is not alleged in the challenge that the corporation of St. John had any interest in the suit. The statement that the action is "*based* upon a lease" made by the corporation is ambiguous and quite consistent with the fact that the corporation is not, in any way, interested in this suit. To sustain a challenge the interest of the Sheriff ought clearly to appear.

Rule refused.

GIFFARD *v.* THE QUEEN INSURANCE COMPANY.

FEBRUARY 19, 1869.

Plaintiff's premises were insured in The London and Liverpool Company, from 2nd October, 1865, to 2nd October, 1866. Before the term expired he received notice from W., the agent at Newcastle, that the London and Liverpool Company would renew the policy on the same terms, and accordingly he paid W. the premium money and got his receipt. A., the general agent at St. John, declined to renew the policy, and paid the premium to defendants who issued a policy (taking the description of the premises from the London and Liverpool books), dated the 16th October, 1866, but insuring from the 2nd October, 1866, to 2nd October, 1867. The premises were destroyed by fire on the 13th October, before the policy issued; but the plaintiff did not know that he was insured by defendants until he received the policy from W., who also acted for them.

Held, That this amounted to a re-insurance, and there being no fraud, plaintiff was entitled to recover; that the policy related back to the 2nd October, and that the condition in the policy, that all facts relating to the state of the premises must be disclosed, must be taken to relate to the time from which the policy took effect.

This was an action on a policy of insurance issued by defendants in favor of plaintiff, to recover the amount of a loss by fire; tried before WELDON, J., at the Northumberland Circuit in September, 1867. The facts are fully detailed in the judgment of the Court. A verdict having been found for the plaintiff,

A. L. Palmer, Q. C., in Michaelmas Term, 1867, pursuant to leave reserved, moved that the verdict be set aside and a nonsuit entered on the following grounds: 1st. That the policy which was issued and dated on the 16th October, 1866, after the loss took place, did not relate back to the 2nd October, the period from which the plaintiff claimed it professed to insure. 2nd. That under the first condition in the policy it is necessary that the state and description of the property at the date of the policy, should be given by the assured. 3rd. That plaintiff had knowledge of the loss at the date of the policy, and should have communicated the information to the in-

surers, and not having done so, with such knowledge he could not effect a valid insurance, nor could another do it for him.

A rule *nisi* having been obtained,

Johnson, Q. C., and *A. A. Davidson*, shewed cause in Hilary Term. The plaintiff, who had been insured by The London and Liverpool the previous year, paid the premium to Williston, their agent, who was not his agent in any way, and supposed that his insurance was continued in The London and Liverpool. He was not aware that in consequence of a new arrangement these policies were to be handed over to The Queen, and could not, therefore, give notice when the fire took place to prevent the policy from being issued. Unless the defendants can shew that there was fraud in the transaction the plaintiffs are estopped from setting up the fact of the fire having taken place before the policy issued, for the policy is made to cover the time when the fire took place previous to its date. There being no fraud they are bound to fulfill their contract. Angell on In. §31–50. Parsons Mercantile Law 526. In Marine Insurance the words lost or not lost have been holden not necessary to be inserted in the policy. 3 Kent, Com. 356–357. Xenos *v.* Wickham, (2 L. R. Appel. 296).

A. L. Palmer, Q. C., contra. As regards the policy I do not deny the law laid down by the other side. The point simply is: Can a man effect an insurance when he has the means of knowing that the premises he seeks to insure are burnt: if not, can another do for him what he cannot do himself? I contend that he cannot. If this is not a policy which by its terms refers back to the time the fire occurred, though there may be no fraud we are not liable. The policy is dated the 16th October, and can only refer to fires happening after that date; but the fire took place on the 13th. [RITCHIE, C. J.: According to your contention they profess to insure for a year, but only insure from the 16th October.] It is at all events subject to the condition that any one insuring must describe truly the state of the buildings to be insured, which was not done here. The plaintiff knew, or had the means of knowing, that these premises were destroyed, and he should have given notice to the Company and the policy would not have issued. The same rule applies as in cases of marine insurance—Proudfoot *v.* Montefiore. (L. R., 2 Q. B. 511).

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

The plaintiff, a resident in the town of Newcastle, was insured on

property their situate, in the London and Liverpool Fire and Life Insurance Company, from the 2nd October, 1865, to the 2nd October, 1866. Edward Allison was the agent of that company in St. John, and Edward Williston the agent or sub-agent at Newcastle. On the 1st October, 1866, Mr. Williston, as such agent, gave the plaintiff the following notice:—

London and Liverpool Fire and Life Insurance Company.

New Brunswick Agency.

ST. JOHN, N. B., 1ST OCT., 1866.

Your policy on your house, blacksmith shop and barn, expires on the second day of October, instant, at noon, and if required will be renewed at the same rate as before.

EDWARD ALLISON, *Agent.*

MR. JOHN GIFFARD.

Policy No. —— $960, at 1½ per cent. $14.40.

Please bring this notice.

EDWARD WILLISTON, *Agent, Newcastle.*

The plaintiff, desiring to continue the insurance, paid the premium, $14.40, to Williston, who indorsed a receipt on the back of the notice: "Received the amount of the within premium," say $14.40.

Newcastle, 6th October, 1866.

EDWARD WILLISTON, *Agent, Newcastle.*

And gave the same to the plaintiff. At this time Williston was likewise acting in behalf of the Queen Insurance Company. He says that in June, 1863, he first acted as agent for the Queen, his prior agency being with The London and Liverpool, and his practice being, when that company would not take a risk, to apply to The Queen; in other words, in securing insurance business to give The London and Liverpool the preference. After the receipt of the premium Williston sent to Allison for a new policy for the plaintiff, policies in both The London and Liverpool, and The Queen, being issued from the offices of the head agencies at St. John. On receipt of Williston's order for the policy, Allison, being unwilling to continue the risk in his office, and, as he says, in consequence of Williston's letter to him, applied to Mr. Jarvis, the agent for The Queen. He says it was probably on the morning of the 15th October, but is not sure whether it was the 15th or 16th; that he did not make any representation, and thought that Jarvis or his clerk got the particulars of the description of the property to be insured from the books of The London and Liverpool office; that the description in the policy in this case was taken from their books, and he had no doubt it was correctly described; that the books of The London and Liverpool office

furnished all the information he (Allison) had, and that Jarvis had access to them; that he was not the agent of Giffard. Mr. Jarvis describes the transaction thus: "I am general agent of The Queen Insurance Company. I had only power to authorize Mr. Williston to act for me, no authority to act for the Company. This application was made on the 16th October, about three or four o'clock, p. m. I think Allison was in his office; his clerks opened the books and read out the description. This policy contains the description he read out; this is the only application. I made out the policy on the 17th." The policy is dated the 16th October, 1866, and recites that whereas John Giffard, of Newcastle, blacksmith, having paid the sum of £3 12s. to the directors of The Queen Insurance Company for insurance against loss or damage by fire of the property thereinafter described, to the amount of £240 currency, as follows:—£100 on his one and a half story framed building, situated detached in the town of Newcastle, occupied by the insured as a dwelling house; £50 on his frame building situate near the above, occupied as a blacksmith's shop; £50 on the contents of the last mentioned building, and £40 on a framed barn situated near the said buildings. The policy then proceeds as follows:—

"Now know ye that from the second day of October, 1866, to the second day of October, 1867, and for so long afterwards as the assured, his executors, administrators and assigns, shall duly pay the premium above mentioned, and the directors for the time being of said company shall accept the same, the capital funds and property of the said company shall, according to the provisions of the deed of settlement thereof (subject to the conditions endorsed hereon), be subject and liable to pay, reinstate, or make good to the said assured, his or their executors or administrators, all such loss or damage as shall happen by fire to the property hereinbefore mentioned, not exceeding upon each head of Insurance the sum or sums above mentioned." The first condition is: "Any person desiring to effect an insurance must state his or her name, address and occupation, and if the insurance be on buildings must state where such buildings are situate, in whose occupation, of what materials they are composed and whether occupied as private dwellings or how otherwise; if the insurance be on goods or other property, then the nature thereof, and the construction and situation of the buildings containing the same, and whether the proposed insurance be on buildings, goods, or other property, in order that the risk may be justly estimated. Full information must be given of all apparatus in any such buildings in or by which heat is produced (other than grates in ordinary fire places, and ovens for domestic purposes), and if there be any such apparatus at the time of proposing an insurance, and the same shall

not have been stated and described, or if any such apparatus shall, after the insurance has been effected, be introduced into any buildings, and the company shall not have assented thereto by an endorsement hereon, this policy shall be void and of no effect."

The policy was mailed by Jarvis to Williston, to be delivered to the plaintiff. Williston says: "It came a few days after the 16th October. I was the agent of the company when I delivered it! * * * I handed it to Giffard believing him entitled to it. I entered into no conversation with him. The policy came to me in the usual course, and I delivered it to Giffard, believing it to be his property. It came to me as the agent of the company (*i. e.*, the Queen) and I delivered it. I never took into consideration how I issued or delivered it." Williston also stated that he received the premium for the London and Liverpool office; that there was no application from Giffard for insurance in The Queen; that he applied to renew in the London and Liverpool office, and paid the premium to him (Williston) as the agent of that company. The plaintiff's barn was burnt on the 13th October, and he claims, in this action, to recover for the loss on the policy so delivered to him by Williston. There was a telegraph-office in Newcastle, and a daily mail to St. John, and if it was the plaintiff's duty to have communicated with Allison, or Jarvis, between the time of the fire and the date of the policy, he could have done so. At the time of the negotiation between Allison and Jarvis, and at the time of the execution of the policy, both Allison and Jarvis were ignorant of the fire; and Williston, the agent of both, had full knowledge of it, and might have communicated the fact to either or both of them before the policy actually issued. There was no imputation of fraud on any party, and it is admitted that they all acted in good faith; nor, is it pretended that the property insured was not accurately described as it existed on the 2nd October, 1866.

The grounds relied on by the defendants as being fatal to the plaintiff's right to recover are—1st. That the policy does not relate back to the 2nd October, but only refers to a loss happening after the date of the policy. 2nd. That under the first condition, it is necessary that the state and description of the property at the date of the policy should be given by the insured. 3rd. That if Giffard had knowledge of the loss at the date of the policy (which he clearly had) or had means of knowledge, he should have communicated the information to the insurers, and that with such knowledge or means of knowledge he could not effect a valid insurance, nor could another do it for him.

This is a very peculiar case, as the policy was clearly not issued by the defendants at the instance of the plaintiff, but at the instance of

the agent of The London and Liverpool Company. It will be necessary for us to ascertain accurately in what position the plaintiff and The London and Liverpool Company stood in relation to one another and to the property, at the time the insurance was effected. The London and Liverpool had been the insurers of the property for the year preceding the 2nd October, 1866. They, by their agent, Williston, before the expiration of the policy, gave the plaintiff notice of the exact time of its expiration, and offered to renew it at the same rate as before, the amount insured and rate of such premium being stated in the notice. Here, then, was a clear, unequivocal offer by The London and Liverpool, to reinsure the plaintiff from the expiration of his then existing policy for another year, on the terms of the then existing insurance. This offer was accepted by the plaintiff and he actually paid his premium to the agent, Williston, who endorsed on the back of the notice containing the offer to renew, a recept of the amount of the within premium, say $14.40. Thus we have the terms of the agreement to insure fully and specifically settled, by an offer from the company, through their agent, assented to by the plaintiff and acted on by both parties, by the plaintiff by paying, and by the insurer by accepting, the premium, and nothing remained to be done but for the company to make out and deliver a policy corresponding with the offer contained in the notice. Here there was an executory contract which would be completed when the policy was drawn out. In practice receipts for premiums are not uncommon, as is said in Angell, (In. 73): "The design of this is to give immediate effect to the insurance, or to supply the place of a formal policy till one can be prepared." * * * And "it constitutes in equity a valid insurance, and in law a valid agreement to insure. Equity would compel the execution of a formal policy, and if a loss occured before the execution of the policy, equity would no doubt relieve the assured." Angell, In. § 34. The Liverpool and London thus became clearly interested in the preservation of the property, and might, we think, have insured in their own names their interest in it. If the policy had been actually issued by them it is probable they would have reinsured in the ordinary way; not having issued the policy they insure in the name of the party originally to be indemnified, whereby in case of loss they became also indemnified. The transaction between the agents Allison and Jarvis, was between The Liverpool and London and The Queen Insurance companies, with which the plaintiff had then nothing to do. The effect of the insurance by the The Queen, effected at the instance of Allison in the plaintiff's name, was for his benefit, and inured as well for the benefit of the London and Liverpool in relieving them from their obligation, provided the plaintiff adopted this act, which

we think he had the right at any subsequent period to do. As to the first question. we think that the policy was intended to be retrospective so as to operate during the period defined in it. This seems clear from the terms of the policy. No language we could use could be stronger than the defendants have used: "From the 2nd day of October, 1866, to the 2nd day of October, 1867, the capital funds of the company shall be subject and liable to pay, reinstate or make good to the assured all such loss or damage as shall happen by fire to the property," and we can discover nothing in the policy to deprive this language of its ordinary plain and intelligible significance. But it is said that there was a breach of the first condition, under which it is alleged the property should be accurately described as it was at the date of the policy. We must put a fair and reasonable construction upon this condition, having reference to the whole instrument, and particularly to the peculiar facts of this case, and to the retrospective character of the liability which the insurer undertook, and looked at in this light, the condition would seem necessarily to refer to the state of circumstances anterior to or at the time the risk commenced. To refer it to the date of the policy would, in fact, make it utterly at variance with the policy and inconsistent with the idea of a retrospective liability, and, therefore, neither a fair nor a reasonable construction, for if the insurance was based on the condition that the premises actually were in on the 17th of October, as described in the policy, what liability did or could the insurer incur for their safety from the 2nd to the 17th, and for what risk during that time was the premium paid? No doubt the ordinary printed policy. adapted to an insurance commencing from its date, was used in this case; but as the contract in the body of the policy was for a liability for the safety of the premises, from a period some fifteen days anterior to its date, it may be that this condition is wholly inapplicable to a policy providing for such a retrospective liability. If by reasonable intendment and fair construction it can be made applicable, it is the duty of the Court to give effect to it rather than to reject it altogether. This, we think, can be done by reading it as pointing to the description of the premises at the date from which the risk was to attach, and not at the date of the policy as contended for.

This brings us to the last objection, that the plaintiff, at the date of the policy, had knowledge of the loss, and should have communicated the information. Had the London and Liverpool Company, at the time of effecting the insurance, done it on behalf of, and for the sole benefit of, the plaintiff, or avowedly as his agent, having no interest in it themselves; or had the insurance been effected by the defendants at the instance of the plaintiff; or had he possessed, at

the time, any knowledge of the transaction between The London and Liverpool office and the defendants, or being a party to it, or in any way, directly or indirectly, participated in it; or had he been under any obligation further to communicate with The London and Liverpool office respecting the property, after payment of his premium, we should feel the force of this objection. But in this case, the defendants took the risk The London and Liverpool had agreed to take off its hands, the agents of both parties being wholly ignorant of any change in the subject matter of the insurance, and Giffard, the assured, wholly ignorant of any negotiation or transaction between them, being neither called upon, nor communicated with, by either party. In perfect good faith Allison gave up, and Jarvis took, the risk Allison had agreed to take. Jarvis treated with Allison alone, looking to him for information as to the state of the property, not for informatiou as to the state at the time he agreed to take the risk, but as to its state at the time Allison had agreed to take it, viz., at the time from which the risk commenced. The defendants received from Allison, and from the books of the company, all the information Allison had respecting the property and the position of the plaintiff, whose premium had been received before the loss, and elected to stand in the shoes of The London and Liverpool Company, and adopted the payment of the premium by the plaintiff to Williston on the 6th October, as a payment to their agent, and issued such a policy to the plaintiff as The London and Liverpool should have issued, reciting therein: "That whereas John Giffard of Newcastle, blacksmith, having paid £3 12s. to the directors of The Queen Insurance Company, for loss or damage against fire," and which statement could only be true on the principle of the defendants' adoption of the payment, on the 6th October, to Williston as a payment to them. This is further confirmed by the fact, that after the fire Williston accounted to the defendants. in his next monthly statement, for the premium so received from the plaintiff, and paid it over to them, and they accepted it without any objection, after they knew of the loss and the delivery of the policy to the plaintiff, thus confirming rather than repudiating the plaintiff's right to recover. Giffard merely received from the defendants what he had a right to receive from The London and Liverpool Company, and which if he had received from the latter, would be open to no question. What, then, does the transaction amount to, but in effect to reinsurance by the defendants of the risk agreed to be taken by the London and Liverpool office, in a form under the circumstances convenient for all parties? This being an arrangement to which the plaintiff was no party, and of which he had no information till it was completed, and the policy transmitted to him, what duty or obligation could

there be on him to communicate with the defendants? He could be only innocently silent, for he knew nothing of what was passing between Allison and Jarvis, nor indeed of the defendants at all in the transaction, and the sub-agent of both companies had precisely the same information as the plaintiff had with respect to the state of the property. When the plaintiff paid his premium The London and Liverpool had all the information they were entitled to, and he was resting quiescent and content in the belief that he was satisfactorily insured with them.

This arrangement, between The London and Liverpool and the defendants, the plaintiff could, no doubt, have repudiated, having been no party to it, and could have refused to receive the policy when sent to him by Jarvis. This he did not do, but accepted the policy and adopted the transaction, thereby consenting to the shifting of the liability from The London and Liverpool to the defendants; and so making the policy inure to the interest of all parties intended to be protected by it. Routh *v.* Thompson (13 East. 284) and Hagedorn *v.* Oliverson (2 M. and S. 405) seem clearly to establish that a party may insure in his own name the property of another for the benefit of the owner, without the previous authority or sanction of the latter, and that it will inure to the interest of the party intended to be protected upon his subsequent adoption of it, even after a loss has occurred: *a fortiori*, if he insures in the owner's own name. There having been perfect good faith throughout this transaction, and the loss being free from all suspicion of fraud, and having taken place during the period the policy was intended to cover, we do not see that the defendants can reasonbly complain. They in effect insured the property "lost or not lost," in other words, "burnt or not burnt," from the 2nd October, 1866, to the 2nd October, 1867; and they are only called upon to do what The London and Liverpool Company would have been compelled to do, if the defendants had not taken the risk off their hands.

We desire it to be distinctly understood that we rest our decision on the peculiar circumstances and individual and exceptional character of the case; not desiring in the slightest degree to ignore or break in upon the well established doctrine, that there must be on the part of the assured the utmost good faith, and the most perfect fairness in disclosing all circumstances material to the risk, and that there should be no concealment of any facts calculated to influence the mind of an intelligent and prudent insurer, even though the insurer did not intend to commit any fraud. But, as in this case, there is no imputation of fraud, and no duty or obligation on the plaintiff to do more than he did, we think our decision in this case simply gives the plaintiff the indemnity he was entitled to, and places the burthen

of that indemnity on the party who fairly agreed to take it, and does not militate against the doctrine we have above recognized.

The plaintiff, under any circumstances, would be entitled to a verdict for the amount of the premium; and if we limited the verdict to that amount, we should, under the peculiar circumstances of this case, recommend the Judge to certify for the plaintiff's costs, so that practically the extra burthen cast on the defendants by our decision is but small; and, as all the equities are unquestionably with the plaintiff, we have decided, though not without hesitation in this case, novel in its circumstances, not to interfere with the verdict.

Rule discharged.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NEW BRUNSWICK,

IN EASTER TERM.

IN THE THIRTY-SECOND YEAR OF THE REIGN OF QUEEN VICTORIA.

CORAM *v.* THE MAYOR, &c., OF ST. JOHN.

APRIL 17, 1869.

The Corporation of the city of St. John are not bound by their charter, as grantees of the Crown, to build or keep in repair wharves or sea-walls for the protection of the city lands from the sea, and there is no condition, expressed or implied, in their charter requiring them to do so.

Demurrer. The action was against defendants for neglecting to repair a wharf in the harbor of St. John, in consequence of which the sea overflowed the plaintiff's land and injured his buildings. The declaration alleged that the defendants, by their Royal Charter, became bound to erect, repair and keep in repair the sea-banks, breakwaters and wharves of the harbor of St. John, and to protect the land on the shore lying between high and low water mark from from the incursions of the sea. The defendants demurred to the declaration on the ground that they were not bound to erect breakwaters and wharves, nor, if erected, to keep the same in repair. The substance of the declaration and the whole case is fully set out in the judgment of the Court. The demurrer was argued in Michaelmas Term last.

B. L. Peters, Q. C., in support of the demurrer. The plaintiff, in his declaration, states that King George III. granted to the defendants the land in the harbor of St. John. If the plaintiff's contention is

correct the Crown would be bound to protect the sea-walls of t whole British Dominion. There may be some particular places England where, by prescription, the Crown is bound to maints sea-walls; but this is not a general duty, and it does not follow th wherever the British flag is erected they are bound to do so. T charter of the city of St. John in its recital, does not impose a such burthen or duty on the corporation as this declaration alleg and as the declaration relies on this charter it is clear there is cause of action. It would be monstrous to say that the city is bou to keep up all these sea-walls. The Mayor, &c., Lyme Regis v. He ley (3 B. and Ad. 77) differs from the present cause, because the the corporation was bound by charter to keep those sea-walls in pair, which is not the case here. If they build a wharf which th are not bound to build, they are not bound to keep it up. It h been asserted that the defendants leased land inside this breakwat but it does not follow that this would create a duty to keep up t breakwater, and even if they were bound to do so the plaintiff h not set it out specifically in the declaration. The King is not bou to keep up sea-walls here by any prescription, and the grant fro the Crown was not made with any such duty attached.

D. S. Kerr, Q. C., contra. 1. The defendants are bound, *ratio tenure*, to repair the sea-walls, all other parties being excluded fr doing so. 2. Having leased the land on the faith of this wharf ing kept up they were bound thereby to keep it up. The privil granted to the corporation by the charter were enormous, gre even, than the Crown could give, and they had to be confirme the Legislature at its first session. The case of the Isle of El Coke, 140) shews that it is the duty of the Crown to protec shore against the incursions of the sea. See, also, 4 Inst. 27 citing the case of the Romney marsh. The defendants have powers to make by-laws given them by their charter. See 3 R 994 Rook's case (5 Coke, 99) illustrates the doctrine of disc in reference to the acts of a corporation. This is similar to t of a ferry granted by charter. It could not be contended th would be permitted to allow a ferry to go down as they ha sea-wall. The conditions which would not avail in the gra subject are operative in a Crown grant, and here the def having entire possession of the sea-walls, are bound to keep repair at their own expense. The tacit condition to keep i is just as strong as if it were written fully in the charter, in the case of the Mayor and Burgesses of Lyme Regis v If a party neglects to use his franchise properly, the conse forfeiture, City of London v. Vanarce (12 Mod. 270). Wh

defendants may say about having discretion to build the wharf they have determined it by building it, and it has brought them gains. The plaintiff is a lessee, and if they neglect their duty by neglecting to keep in repair they are liable. Bargate v. Shortridge (31 L. and E. 44). The Statute of Henry VIII only enlarged the commission of the Crown, and it becomes a serious question how far the Statutes of England can affect this country. The whole powers of the Crown having been given to the defendants by their charter, and the Crown being bound to issue commissions and have sea-walls made, and as the powers of the Crown have been passed over to the corporation, they are bound also, and it is hard to see how any commission now could be issued here under the Statute of Henry VIII, all the power having gone out of the Crown. The power being given to the defendants they are bound to use it properly and keep it in repair. (Chip. mss. 155.) The defendants are conservators of the harbor, and they are bound to exercise their power to preserve it from harm. After they have declared the necessity of a breakwater by erecting it, they cannot turn round and say that they will not keep it up, after their tenants have taken leases on the faith of its erection. The landlord is bound to protect his tenant in the peaceable enjoyment of the property leased. Suppose the defendants were to leave the streets in such a state that they became impassable, and a man broke his arm or his leg in consequence, they would be liable; and after they find it necessary to build a breakwater to preserve the harbor, if they allow it to go down are they not equally liable? In the charter, 3 Rev. Stat. 1005, the mayor is named as conservator of the harbor, and if the mayor, who is their officer, neglects to keep it in repair, they are liable. No one else is bound to repair, or has a right to repair, but them. They have all the rents, profits and perquisites of the city.

B. L. Peters, Q. C., in reply. The principle of this case is met by the case which I first cited, which shows that no duty would devolve on the corporation to keep the sea-walls in repair, unless by the express words of their charter. In the case of the Mayor, &c., of Lyme Regis v. Henley, the Crown had originally erected piers and granted them to the corporation of Lyme Regis, and they were bound by express words to keep them in repair; but the present case is entirely different, no such condition is annexed to our charter, and it is absurd to say that any such condition is implied. When the declaration states that it was the duty of the Crown to keep up, and keep in repair, sea-walls, and that this duty devolved on the defendants by their charter from the Crown, the whole case hinges on this, and nothing more can be imported into the declaration to sup-

port it. The fact of them having erected a wharf does not make them liable, unless a liability is created by the express words of the charter. So the whole case resolves itself into these points:—1. That no duty is cast upon the defendants by their charter to keep sea-walls in repair. 2. That there is no such duty cast upon them by reason of any tenure which the plaintiff holds as tenant to them.

Cur. adv. vult.

ALLEN, J., now delivered judgment.

This was an action against the defendants for neglecting to repair a wharf, in consequence of which the sea overflowed the plaintiff's land and injured his buildings. The first count of the declaration states that, before the committing of the grievances, His late Majesty, King George III., was seized in fee, in right of his crown, of certain lands between high and low water mark, and lands fronting on the sea, on the western side of the harbor of St. John, embracing the lands of the plaintiff, thereinafter described, and by virtue of his prerogative having general jurisdiction over such lands, and the tide waters flowing and reflowing upon the same, and being bound to guard and protect the shores and lands adjoining the sea from being injured by the sea, heretofore on the 18th May, 1785, by letters patent under the great seal of the Province, created the defendants a body corporate, by the name of the Mayor, Aldermen, &c., of the city of St. John, and did thereby, among other things, give and grant to the defendants all the lands and waters therto adjoining, or running in by, or through the same, on the western side of the harbor of St John, with the sole power of amending and improving the river St John, bays and harbors thereof, for the more convenient, safe and easy navigating, anchoring, riding and fastening the shipping resorting to the city, and for the better regulating and ordering the same and with full power to erect and build such and so many piers and wharves as they should see proper for the better securing the harbor and further gave and granted that the mayor of the said city, and no other, should be bailiff and conservator of the waters of the bay harbor and river St. John, in and through all the limits of the city of St. John, upon all the banks, shores and wharves thereof. And further gave and granted to the defendants all ungranted lands on the western side of the harbor of St. John covered or uncovered with water. That by virtue of such grants the defendants became seized and possessed of the said lands and tenements fronting on the sea, on the western side of the harbor, and of the lands, beach and and flats lying between high and low water mark on the said western side of the harbor, and thereby became bound to erect, repair

and keep in repair, the sea-banks, breakwaters, and wharves thereof, for the safeguard and preservation of the aforesaid harbor, and to protect the lands fronting on the shore on the western side of said harbor, and the lands lying between high and low water mark, from the incursions and outrageousness of the sea, and from doing damage there. That before the committing of the grievances by the defendant, a certain portion of the western side of the harbor fronting on the sea, belonging to the defendants by virtue of the said grant and embracing the premises of the plaintiff, being subject to the incursions of the sea from time to time upon it, and by reason thereof being unfit for profitable occupation, and a certain portion of the said western side of the habor, so embracing the plaintiff's premises, being exposed to the surge and violence of the sea, and endangered thereby, the defendants had erected a sea-bank, breakwater or wharf on a portion of said land between high and low water mark, and near to and below the premises of the plaintiff thereinafter mentioned, and which checked the violence of the sea upon the lands above and where the plaintiff's premises were situated, and rendered them fit and serviceable for occupation and use; and the defendants, after such erection, being the owners of such lands above, were enabled to demise and lease, and did demise and lease the same for a certain rent receivable and received by the defendants for the use of such land. That before the committing of the grievances, the plaintiff became assignee and tenant, and was lawfully possessed of the said land and premises, beach and flats immediately above the said sea-bank, breakwater or wharf, and which land had before that time been demised and leased by the defendants as aforesaid, and was also possessed of certain wharves, stores, fish-houses and other buildings on the said lands, beach or flats, so demised by the defendants, of great value, &c., and the plaintiff by reason thereof, became liable to pay the defendants the rents of the lands so demised and leased, which lands had been theretofore protected, and of right ought to be protected from the incursions and outrageousness of the sea by the sea-bank, breakwater, or wharf, so erected by the defendants, and it became, and was, the duty of the defendants from time to time, to repair, and keep in sufficient and proper repair the said wharf, sea-bank, or breakwater, as often as need should require, in order to protect the plaintiff's property above from injury and destruction by the incursions and outrageousness of the sea. Breach —that the defendants, intending to injure the plaintiff, and to deprive him of the use and benefit of his lands, beach and flats, and the wharves and building thereon, therefore, to wit, on the 1st January, 1864, and from thence continually, until the commencement of the suit, wrongfully and unjustly suffered and permitted the said

sea-bank, breakwater or wharf to be and continue, and the same, during all that time, were ruinous, prostrate, fallen down, carried away, out of repair, and in great decay, for want of needful and necessary repairing and supporting the same; by means whereof, the sea and waters, and divers materials carried and forced by the violence of the winds and waves of the sea, afterwards, to wit, on the 1st February, 1868, and on divers other days, &c., flowed and were carried with great force and violence in, upon, under, over, and against the lands of the plaintiff so leased as aforesaid, and in, upon, &c., the wharves and buildings of the plaintiff, standing and being on the said land, and thereby greatly damaged and injured, undermined, washed down, prostrated and destroyed the plaintiff's wharves, stores and buildings erected on the said land; and forced and carried a quantity of stones and rubbish upon the plaintiff's premises: whereby he was not only deprived of the use and benefit of his land, wharf, &c.. but his wharf and buildings have greatly lessened in value, and he suffered damage to the amount of £300.

The second count varied from the first only in stating more generally, that the defendants were seized in fee and lawfully possessed of the ungranted land fronting on the shore on the western side of the harbor, and of the beach and flats between high and low water mark, and embracing the plaintiff's premises.

The defendants demurred to the declaration on the ground that they were not bound to erect breakwaters and wharves, nor, if erected, to keep the same in repair. The case, which raises a very important question upon the construction of the charter of the city of St. John, has been ably argued, and after a careful consideration, I have arrived at the conclusion that the plaintiff cannot sustain the action.

By the charter of St. John, dated the 18th of May, 1785. (Local Stat. p. 981), after reciting that the inhabitants of the town or district of Parr, lying on the east side of the river St. John, and of Carleton and the west side, thereof, at the entrance of the river St. John, had petitioned Thomas Carleton, Esq., the Governor of the Province, for a charter of incorporation comprehending the districts on both sides of the said river. erecting it into a city to be called the city of St. John, and conferring on the corporation the powers usually granted to mercantile towns for the encouragement of commerce, the Crown granted to the inhabitants of the said districts that there should forever thereafter be a city incorporate by the name of the mayor, aldermen and commonalty of the city of St. John, and that all the land and water and the land covered with water within certain limits should be a city incorporate by the name of the city of St. John, and after granting certain powers and privileges, the charter proceeds as follows:—

"And we do further, of our special grace, &c., give and grant unto "the said mayor, aldermen, and commonalty, and to their successors, "that they and their successors be the conservators of the water of "the river, harbor and bay of the said city, and shall have the sole "power of amending and improving the said river, bay and harbor, "for the more convenient, safe, and easy navigating, anchoring, "riding, and fastening the shipping resorting to the said city, and "for the better regulating and ordering the same; and that the said "mayor, aldermen and commonalty, and their successors, shall and "may, as they shall see proper, erect and build such and so many "piers and wharves into the said river as well for the better securing "the said harbor and for the lading and unlading of goods, as for "the making docks and ships for the purposes aforesaid, and that "they shall and may have, receive and take reasonable anchorage, "wharfage, and dockage for the same, without any account thereof "to be rendered to us, our heirs or successors." In the case of Henley v. the Mayor. &c., of Lyme Regis, (5 Bing. 91; 3 B. & Ad. 77), where the Crown granted to the defendants the borough or town of Lyme Regis, and also the building called the pier, quay or cob, with all the privileges, profits, franchises, &c., the grant contained a clause that the "mayor and burgesses, and their successors, all and singular "the buildings, banks, sea-shores, and all other mounds and ditches "within the aforesaid borough of Lyme, and also the said building "there called the pier, quay or cob, at their own costs and expenses, "thenceforth from time to time, forever, should well and sufficiently "repair, maintain and support as often as it should be necessary or "expedient." The corporation in that case was held liable in damages to an individual whose property had been injured by the sea in consequence of the nonrepair of the banks and sea shores. According to the judgment of Best, C. J., (5 Bing. 104), on the motion to arrest the judgment, the corporation was to be treated as a public officer, appointed to discharge a public duty, and liable either for an act of omission or commission, by which an individual sustained injury. He does not appear to rest his judgment entirely upon the condition in the grant that the mayor and burgesses should repair the banks, &c., but, that it was the duty of the king to repair the walls before the grant when the king granted the estate, he shifted his liability upon the mayor and burgesses. He says, "whether the "king ever was bound to keep up these sea-walls or not, the king "having thought proper to make the grant for the benefit of the "public, the instant they (defendants) accepted it for the benefit of "the public, they took on themselves the responsibility of discharg-"ing those duties to the public, it is expressly declared they were to "discharge at the time they accepted the borough, and having

"neglected them, they have become responsible. That would be my "opinion even if I should be satisfied that the king never was bound "to repair these walls, but I am convinced that the king was bound "at one time to repair these walls, and that the king has shifted the "liability which belonged to him, upon those to whom he has granted "the estate." * * * The king by his "prerogative, as will be "found in every book on the prerogatives of the Crown, is bound to "take care, to guard and protect the shores and lands adjoining the "sea from being overflowed by the sea; he is to discharge that duty "as it was discharged before the statutes of Henry VIII., by issuing "commissions and making ordinances which we find, he certainly "was in the habit of making before the statute of Henry VIII., call-"ing on persons who had lands near the sea to do their duty in pro-"tecting their own lands and the lands of others from the incursions "of the sea." * * * "If, as the owner of the banks or walls, he "(the king) was bound to repair, without any prescription when he "made the grant, could he not cast the obligation on another? It "seems to me it is perfectly clear from what is stated on the record "that the king was bound, as owner of the town of Lyme Regis "and as the owner of these very banks and walls, to repair these "banks and walls. When he granted to the corporation of Lyme "the profit and advantages of the tolls, he transferred to them at the "same time the liability which the receipt of that profit and advan-"tage imposed on him."

In the judgment in the Court of Error (3 B. and Ad. 89) Lord Tenterden puts the liability of the corporation, on the obligation created by the acceptance of the charter containing the declaration respecting the repairs, expressly declining to give any opinion as to the king's liability to keep the sea-shores in repair before the grant. This case, therefore, does not decide the right contended for in the present case, and it is, therefore, necessary to consider whether the defendants are liable, independent of any express condition or covenant. And this raises two questions:—1. Whether the Crown was bound before the grant to protect the land from the inundation of the sea, and if so, whether the defendants claiming under the Crown, took the land *cum onere*? 2. Whether the defendants, having accepted the charter giving them the sole power to erect piers and wharves in the harbor of St. John, are clothed with an implied trust for the benefit of the public, or in other words, whether they are public officers appointed to discharge public duty. According to the opinion of Best, C. J., before referred to, the king is bound by his prerogative to protect the shores and lands adjoining the sea from being overflowed by the sea, and he refers to Callis, p. 115. In Chitty Prerog. 173, it is said that the king might, before any statute

made for commissioners of sewers. provide against inundations of the sea by embankments and other necessary means.

In Fitzh. Nat. Brev. 113, it is said that the king of right ought to keep and defend his kingdom as well against the sea as against enemies, that it be not drowned or wasted, and to provide remedy for the same; and therefore, if the sea-walls be broken, or the sewers or gutters not scoured, so as the fresh waters cannot have their courses, the king ought to grant a commission to inquire thereof, and to hear and determine the defaults. The form of the commission is given, authorizing commissioners to hear and determine whether sea-walls are broken, and by whose default, and to compel the reparation of them by those persons by whose default the damage happened, and who may be benefited by the repair. The case of the Isle of Ely (10 Co. 141) is referred to in the books on this subject. But that case does not determine that the king is bound to repair sea-walls; but only that he might do so by virtue of his prerogative as the guardian of the realm: in other words, that a commission to compel the reparation would be legal. None of these books or cases shew, so far as I can discover, that there is any right in the subject to have the repairs made, on which a remedy against the Crown could be founded by petition of right or otherwise. If the issuing of such commissions was a part of the prerogative power of the Crown, which it might exercise, or not; then I conceive the subject would have no mode of enforcing it against the Crown, and no liability would attach to the Crown's grantee. The absence of any case shewing that such a claim has ever been attempted to be enforced against the Crown, is strong evidence that no such right existed in a subject. I think, therefore, that no burthen of protecting the lands adjoining the sea-shore would attach upon the defendants, simply as the grantees of the Crown. Then, secondly, did the charter create an implied trust for the benefit of the public, and did the corporation, by accepting the charter, bind themselves to protect the lands fronting on the harbor from the overflowing of the sea?

The case of Henley v. the Mayor of Lyme Regis does not throw much light upon this question. The principal point in contest there was whether the words of the charter created an express condition on the part of the corporation to repair, their liability being scarcely disputed if there was such a condition. Whatever the liability of the defendants in this case might be, if this was an action against them for negligence in not building or repairing wharves, &c., whereby a vessel was injured in navigating the harbor, as was the case of Gibbs v. the Trustees of Mersey Docks (Law R. 1. H. Lord, C. 93) is a point on which I am not required to express any opinion. It is sufficient to say that even if the charter does create any implied

trusts to build and repair wharves for certain purposes, this case does not come within the terms of it, as the plaintiff's claim to have the wharf repaired is not for any purpose connected with the navigation of the harbor, or the convenience and accommodation of the shipping, but for the protection of buildings which he has erected on land occupied by him fronting on the harbor. The charter imposes no duty on the corporation to build wharves for that purpose. Where the consequences of maintaining the doctrine contended for by the plaintiff's counsel would be so serious to the corporation, by making them liable to erect and maintain sea-walls or breakwaters along a very considerable extent of sea-coast, I think it would require very clear evidence that such was the intention of the Crown, and that the charter ought to declare such intention, beyond any reasonable doubt, before such a construction should be given to it. On both grounds, therefore, viz: 1st, that even if the king was bound to protect the lands adjoining the sea, which I do not admit in the ordinary sense of the word *bound*, the subject has no means of enforcing the Crown to do so, and therefore no liability attached to the Crown's grantee; and 2ndly, that there is no condition, expressed or implied, in the charter, requiring the corporation to build sea-walls for that purpose. I think the defendants are entitled to judgment on the demurrer in this case.

I regret that my learned brethren are precluded from taking part in this decision, and that a case involving questions of so much importance shall depend upon my judgment alone.

Judgment for the defendants.*

FOSHAY *v.* BARNES.

APRIL 17, 1869.

Manure lying in heaps in the barn-yard is a chattel, which may be taken away by the out-going tenant, even after his tenancy has expired, and trover will lie for it if held or taken away by the landlord.

This was an appeal from the County Court of King's. The action was trover for a quantity of manure which defendant had removed from a farm occupied by plaintiff as yearly tenant, which farm plaintiff's landlord had conveyed by deed to defendant. The defendant removed this manure, which was in heaps in the barn-yard, after

* Ritchie, C. J., and Weldon, J., being ratepayers of St. John, and Fisher, J., not having heard the argument, took no part.

the expiration of plaintiff's tenancy, but before he had quitted possession of the farm. The lease contained no stipulation either respecting the mode of management of the farm, or the disposal of the manure. Defendant claimed the manure as appurtenant to the land and as passing to him under the deed from the vendor; plaintiff, on the contrary, alleged his right to the manure which had accumulated during his tenancy. The County Court Judge directed the jury. that in the absence of any custom or special agreement to the contrary, the out-going tenant had a right to the manure, and that if the landlord had desired to have it used upon the land, he should have inserted a stipulation to that effect in the lease. A verdict having been found for plaintiff, the defendant moved for a new trial on the ground of misdirection, which, after hearing argument of counsel on both sides, the learned Judge refused, deciding that the manure belonged to the tenant and not to the farm, and that the defendant in removing it was guilty of a conversion for which this action would lie. The argument on appeal was heard in Hilary Term last.

Fraser, in support of the appeal. The mere relation of landlord and tenant is a sufficient consideration for tenant's promise to manage a farm in a husbandlike manner, and an action will lie for carrying away straw, dung, compost, &c., against the implied consideration of tenancy, Powley *v.* Walker, (5 T. R. 373). Woodfall's L. & T. 446. Manure is an appurtenant to the freehold and passes with it to the grantee. Smith's Landlord and Tenant, (Am. Ed. 337). This is also the doctrine in the American Reports. In Perry *v.* Carr, (44 New Hampshire, 118), it is held that manure made upon a farm from the consumption of its products is regarded as belonging to the realty, and may not be removed by a tenant in the absence of a special contract. The same doctrine is laid down in 13 Gray, Mass. Rep. 53, 41 New Hampshire, 519, 2 Foster, N. H., 524. These cases shew that the current of American authority is all in favor of manure being regarded as appurtenant to the freehold. This is also held in Weatherby *v.* Ellison, (19 Vt. Rep. 379), where the Court say: "The principle may be regarded as well settled; that manure of animals spread about the barnyard, or lying in piles at the stable windows, is so attached to the land that it passes by a deed of the real estate." Even if the party had the right to remove the manure, it being in the nature of a *quasi* fixture, he could not remove it after the term of his tenancy had expired, and not having removed it during his tenancy, he cannot claim it now. All the English cases in regard to manure are controlled either by custom or covenant, and as the principles of good husbandry require the manure to be left on the

land, the Court, in deciding this point for the first time, should not give a decision which will operate injuriously to the principles of good husbandry or induce a multiplicity of actions.

Crawford, contra. It is not shewn that this farm was leased for agricultural purposes, and to bring the case within the American autorities, that ought to appear. Neither does it appear that there was manure upon the farm when plaintiff became tenant. Fixtures are not distrainable but manure is, therefore it is not a fixture. Ridgeway *v.* Stafford, (6 Ex. 404). It is laid down in Wm.'s Exors. (3 ed. 574), that manure in heaps is personal property, and this is the doctrine of all English authorities. Higgin *v.* Mortimer, (6 C. & P. 616). Yearworth *v.* Pierce, (Alleyn 32, S. C. Sty. 66), Roberts *v.* Barker, (1 C. & M. 807), go to shew that at common law the tenant has a right to take away the manure; and in Oliver's Con. there is a form of lease forbidding its removal, shewing that without such stipulation the tenant might take it away. See also Wm.'s Per. Prop. 71. Beattie *v.* Gibbons, (16 East, 116). Manure cannot be levied on by the sheriff, but this is by statute, it is therefore clear that at common law the sheriff would have had a right to levy, and therefore that it is personal property. This being the case, unless there is an express stipulation or custom to the contrary, the tenant may remove it. Arch. Law. & Len. 320. Even the American authorities are not uniform on the point. The case of Ruckerman *v.* Outwater (4 Dutch. New Jersey Rep. 581) agrees with the English cases and shews that manure in the barn-yard does not pass with the land. As to the tenant not being in a position to claim the manure after the lease expires, it is clear that he can take a chattel which is his own property at any time.

Cur. adv. vult.

ALLEN, J., now delivered the judgment of the Court.

We think the judgment of the County Court is correct. The question is, whether manure in a heap is a chattel or is parcel of the freehold. It is said in Wm.'s Exors. (3 ed. 574) that dung in a heap is a chattel and goes to the executors; but if it is scattered on the ground, so that it cannot be gathered without gathering part of the soil with it, then it is parcel of the freehold, for which is cited Yearworth *v.* Pierce (Alleyn 32, S. C. Sty. 66). The law is stated in the same way in 11 Vin. Ab. 175, 1 Chit. Gen. Pr. 92, and by Parker, J., in Thomson *v.* Walsh (2 Allen, 371), though in that case the manure was not produced upon the land, but that, we think, does not alter its character as a chattel. If it was a chattel, did the plaintiff lose his right to it by not removing it before the expiration of his tenancy,

and did it, by remaining on the land, become the property of the owner of the soil? The case has been argued on the analogy of the law relating to fixtures, in the sense in which that word is understood in questions between landlord and tenant. In such cases the article becomes the property of the landlord unless it is removed by the tenant during the term, or, perhaps, while he continues in possession after the expiration of his term. But no question of that kind arises here, because, even if the question of possession would affect the case, the plaintiff's lease had terminated, and he had substantially given up the possession of the land to the defendant, and, therefore, if the manure could be considered a part of the freehold, the plaintiff would have lost his right to it. In all the cases where questions of this kind have arisen between landlord and tenant, the articles have been actually affixed to the freehold and become part of it, and the tenant has claimed the right to disannex and remove them, but here the manure was merely lying in a heap on the land and could be removed without breaking or disturbing the soil, it was no more affixed to the land than a quantity of wood, hauled there for fuel, or a stack of hay, would have been. In Higgion *v.* Mortimor (6 C. & P. 616) the alleged wrong was the digging and carrying away the earth which was beneath the dung-heap, and not the dung itself. If then, the manure was a mere chattel, what is there to prevent an action of trover being brought for it? In Penton *v.* Robart (2 East, 88) which was an action of trespass against a tenant for pulling down and taking away a building after the expiration of his term, Lord Kenyon asked whether if he had left any personal chattel on the premises, he would not have been entitled to it after the term? and Laurence, J., said he was not a trespasser, *de bonis aspirtatos.* In Anthony *v.* Haney (8 Bing. 186) which was an action of trespass for entering the plaintiff's close, the defendant pleaded that certain of his goods and chattels were on the close, and that he entered to take them, doing no unnecessary damage. The plea was held bad, but Tindal, C. J., said, in answer to the argument, that the owner might have no remedy where the occupier of the land refused to deliver up the property, or make any answer to a demand for it; "that at any rate the owner might in such a case enter and "take his property, subject to the payment of any damage he might "commit," and Park, J., said: "The defendant is not, as it has been "contended, without remedy, for he might sue in trover, after a proper 'demand." In Wansbrough *v.* Maton (4 A. & E. 884) trover was held to be maintainable by a tenant against his landlord, for a chattel left on the property by the tenant when he gave up possession. In Wilde *v.* Waters (16 C. B. 63 s. c. 32 Law & Eq. R., 422) it was admitted that if the out-going tenant left a chattel on the property the

new tenant would be liable in trover if he exercised any dominion over the chattel, though he might not be bound to allow the owner to enter and take it away. In Leader v. Homewood (5 Com. B. N. S. 546) the action was brought for fixtures and other effects left by the plaintiff upon the demised premises at the end of his tenancy, and after the landlord had entered, and it was held that he was not entitled to recover in respect of the unsecured fixtures, but only for the conversion of the other effects, the principle of law being, that whatever is fixed to the soil belongs to the soil, and is not a chattel, but parcel of the freehold, and as such, not recoverable in trover. Mackintosh v. Trotter (3 M. & W. 184). It is clear, therefore, that the owner of a movable chattel does not lose his property in it by leaving it on the demised premises after the expiration of his lease, and that, if the owner of the soil exercises dominion over it, he is liable to trover. The plaintiff, then, had a right to recover in this case unless the defendant can make out that the manure was appurtenant to the land, and passed to him by the deed. This, we think, he has not made out by any of the English authorities, and we adopt the law as stated in the case of Ruckman v. Outwater, decided in New Jersey (4 Dutch. 581) rather than in the other American cases cited on the argument.

As to its being contrary to the course of good husbandry to remove manure from a farm, no such rule obtains in this country. In England it either arises from express contract, as will be seen in the precedents of farm leases in Bythewood, or any other book of precedents, or is implied from the custom of the country. See Roberts v. Barker (1 C. & Me. 810). In Hutton v. Warren (1 M. & W. 472), Parke, B., says that in order to oblige the tenant to farm according to good husbandry, you must either have some express contract or some implied contract, from the custom of the country. In either case it could not alter the tenant's property in the manure, it would only make him liable to an action if he sold it or took it away. Burbage v. King (2 Chit. R. 246) Ridgway v. Lord Stafford (6 Exch. 404). For these reasons we think the judgment of the County Court must be affirmed with costs.*

*Ritchie, C. J., and Weldon, J., not having heard the argument, took no part in this judgment.

WOODSTOCK RAILWAY COMPANY *v.* TUPPER.

APRIL 17, 1869.

In an action for calls on stock, the coroner who summoned in the jury was a stockholder, but before receiving the *venire*, transferred his stock, which was not all paid up, to the president of the company. The Act of Incorporation declared that no shareholder should be entitled to transfer his stock unless all calls were paid. In summoning the jury, the coroner questioned them as to their views in regard to railways, and was guided in his selection by their answers.

Held, That he had not divested himself of his interest, and was not an impartial officer, and there must be a *venire de novo*.

This was an action to recover the amount of a call on certain railway stock subscribed by the defendant. At the trial before Weldon, J., at the Carleton Circuit in September last, the defendant's counsel challenged the array of jurors, on the ground that the coroner who issued the *venire* was a stockholder in the company and therefore an interested party. It appeared that, previous to the *venire* coming into the hands of the coroner, he had transferred his stock to the president of the company, but the calls upon it were not at that time all paid up, and the Act of Incorporation, 27 Vict., cap. 57, § 7, declares that "No shareholder shall be entitled to transfer any share after any call shall have been made in respect thereof, until he or she shall have paid all calls for the time being due on every share held by him or her." It also appeared that the coroner in summoning the jury addressed to those he proposed to summon the question whether they were in favor of progress and railways, and was guided in summoning them by their answers, summoning only those who replied affirmatively. The point with reference to the challenge was reserved, and the case went to the jury who found a verdict for the plaintiffs.

S. R. Thomson, Q. C., in Michaelmas Term last, obtained a rule *nisi* for a new trial on the point reserved. He contended that as the law declared that a transfer of stock could not be made until all calls had been paid, and as the calls in this case on the stock transferred had not been paid, the transfer was void in law and the coroner was still a stockholder and an interested party, and as such not capable of summoning a jury to try a case in which he was interested.

C. H. B. Fisher shewed cause in Hilary Term, contending that the transfer of stock made by the coroner was *bona fide*, and that he was not an interested party. The defendant must make out a case of partiality or he fails, and the coroner being in a position to clear himself of any interest he had, and having done so, the rule should be discharged.

S. R. Thomson, Q. C., contra. The circumstances in connexion

with summoning of the jury amount to a fraud on the defendant. The coroner, an interested party, summons the jury; he selects them, not as he should have done from the county generally, but from those holding certain previously ascertained views on the railway question, and in this way the defendant's rights are sacrificed.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

We think there should be a *venire de novo* in this case. At the time the action was commenced the coroner was a stockholder in the company, and a call had been made upon his shares, which was unpaid. By the 7th Sect. of the Act incorporating the Woodstock Railway Company, (27 Vic. c. 57), it is declared that "No shareholder shall be entitled to transer any share after any call shall have been made in respect thereof, until he shall have paid all calls for the time being due on every share held by him." It is difficult to see how, in the face of such language, a shareholder could divest himself of his interest while the calls remained unpaid. In the case of Reg. v. Wing, (17 Q. B. 645), it was held that a shareholder in a company incorporated under the Companies' Clauses Consolidation Act, 1845, (8 & 9 Vict. c. 16), who had not paid up all calls due upon his shares could not make a valid transfer of such shares as against the company. The section of the Act upon which that case was decided is almost identical with the 7th Sect. of the 27 Vict. c. 57. It declares that no shareholder shall be entitled to transfer any share after any call shall have been made in respect thereof, until he shall have paid such calls, nor until he shall have paid all calls for the time being due on every share held by him. We deem it right to notice that the coroner in this case stated in effect, that in selecting the jury he addressed to the parties he contemplated summoning, the inquiry whether they were in favor of progress and railways, and was governed in his selection by their answers, summoning those only who replied affirmatively. This could only have been done with a view of having the jury composed of men of certain ascertained opinions, calculated to govern them in their adjudication on the matters likely to arise in the litigation on which they would be called to decide, a course of proceeding we cannot too strongly condemn. The duty of a summoning officer is impartially to select from the persons in the county qualified to serve as jurors, good and lawful men, wholly irrespective of their opinions, generally, on questions which may incidently arise in the progress of the causes they are summoned to try. The summoning officer has no right, in the discharge of his duty, even to know the merits of the question, still

less to take on himself to decide who, from their ascertained opinions are best qualified to decide it. For these reasons we think the coroner who summoned the jury in this case was not an impartial officer, and that a *venire do novo* should issue.*

DOE ex dem. CONNEL *v.* DICKINSON.

APRIL 17, 1869.

Where a sheriff's deed, and his affidavit of due execution and sale bear different dates, parol evidence is admissible to prove that they were executed on the same day.

Where a nonsuit has been ordered on one ground the defendant cannot sustain it by another.

Ejectment tried before WELDON, J., at the last Carleton Circuit. The plaintiff claimed title by a deed from the sheriff, which was dated the 13th February, 1841, while the affidavit of the sheriff of the due seizure, advertisement and sale of the land, required by 4 Wm. IV., c. 22, bore date the 17th January, 1843. The plaintiff's counsel offered parol evidence to show that the deed was executed on the same day as the affidavit, but the learned Judge refused to admit such evidence, and the plaintiff was nonsuited.

C. H. B. Fisher, in Michaelmas Term last, obtained a rule *nisi* to set aside the nonsuit, on the ground that the evidence should have been admitted.

S. R. Thomson, Q. C., shewed cause in Hilary Term. The original execution in this case was not forthcoming, and there was no evidence of a proper search having been made for it at the clerk's office after the death of Winslow, the sheriff, and the search at the sheriff's office was made by the lessor of the plaintiff, who was, I contend, not the proper party. The effect of this was that the secondary evidence of the execution was improperly put in. [RITCHIE, C. J.: Can you take this ground now, the nonsuit not having been granted on it?] I think I am entitled to hold it on any ground. If a nonsuit is moved for on two grounds, one tenable and the other untenable, and the Judge grants it on the latter, I contend that I have a right to sustain it on the other. I rely on the ground that there was no proper proof of the execution to justify the admission of secondary evidence. The statute must be strictly followed.

C. H. B. Fisher, contra, contended that the nonsuit not having

* Fisher, J., took no part in this judgment.

been granted on this ground it could not not now be taken. The case of Doe *ex dem.* Bustin *v.* Conolly (3 Kerr, 70) was conclusive as to the other.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.*

We think the rule to set aside the nonsuit in this case should be made absolute, on the ground that the plaintiff should have been allowed to show the actual date of the execution of the sheriff's deed, the date mentioned in the deed not being conclusive. In Bustin *v.* Donelly (3 Kerr, 70) Chipman, C. J., delivering judgment in a case arising upon a sheriff's deed, says: "The Act expressly requires "that the affidavit should be made at the time of the execution of "the deed. It appears to have been made on the 2nd February, "1844, whereas the deed bears date the 2nd January, 1844, and there "was no proof of its being executed on any other day. Now, although "parol evidence is admissible to show that a deed was made on a "day different from the date, yet, in the absence of such evidence, "the date is conclusive." There must be some evidence to show that "a deed was not executed on the day when it bears date."

The nonsuit in this case having been ordered on the ground that the affidavit of the deputy sheriff, of the regularity of the proceedings, was not made at the time the deed was executed, the question of the sufficiency of the search for the execution does not now arise.

Rule absolute.

REED and another *v.* WELDON.

APRIL 17, 1869.

A ship was insured for a voyage from Liverpool to Cardiff, thence to Aden, and from thence to India or Burmah. She was chartered for and set sail from Cardiff to Aden, with the intention of proceeding from Aden to Chincha, instead of India or Burmah, and was lost before reaching Aden. Held,—No deviation, and that the underwriter was liable.

A ship was insured for a voyage from Dundee to St. John, N. B., thence to a port of discharge in the United Kingdom. She started on her voyage and arrived at St. John, where she was put on the blocks, detained seventeen days, repaired and reclassed. Held, That this changed the risk, was equivalent to a deviation, and avoided the policy.

Where at the trial, a nonsuit was moved and upon hearing the opinion of the Judge, a verdict was taken by consent of counsel, the question cannot afterwards be raised, as to whether the case should have been submitted to the jury.]

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* Fisher, J., took no part

Whether delay in a voyage is unjustifiable or not, is a question of law for the Judge; but whether unreasonable or not, is a question for the jury.

This was an action against the defendant, as underwriter, on three policies of insurance, two on the *Mount Pleasant* and one on the *Peter Maxwell*. The policies on the *Mount Pleasant* were underwritten by defendant for $400 and $600, and were dated 27th September, 1865, and 7th October, 1865, respectively. Under them plaintiff was insured "at and from Liverpool to Cardiff, while there, and thence to Aden while there, and from thence to a port of loading in India or Burmah, and thirty days after arrival with leave to call at a port for orders." The following memorandum was endorsed upon these policies: "Permission is hereby given for the ship *Mount Pleasant*, insured under the policy herto annexed, to use Callao and Chincha Islands instead of India and Burmah, as expressed in said policy." Some of the underwriters signed this memorandum, but defendant refused to sign or assent to the alteration. The ship was chartered to Aden and sailed from Cardiff, for that port, with the intention of afterwards proceeding to Callao instead of India or Burmah. She met with the loss sought to be recovered on the passage from Cardiff to Aden, and the defendant resisted payment on the ground that the voyage was changed and that he was thereby discharged.

The policy on the *Peter Maxwell* was on a voyage from Dundee, Scotland, to St. John, N. B., and thence to a port of discharge in the United Kingdom, not east of London, and thirty days after arrival, with leave to call at a port for orders. The vessel sailed from Dundee and arrived at St. John, where she remained fifty-one days. While in St. John, and after being unloaded, she was placed on the blocks and overhauled, repaired and reclassed. She remained on the blocks seventeen days, and proceeded on her voyage on the 28th November. The plaintiff stated in his evidence that the vessel was brought out for the purpose of being reclassed. The defendant resisted the claim for loss on the ground that the detention in St. John, for the purpose of reclassing, was a deviation and changed the risk. At the trial before RITCHIE, C. J., at the St. John August Circuit, a motion was made by defendant for a nonsuit, when the learned Chief Justice intimated that he thought that the abandoning or intention to abandon the voyage from Aden to Burmah, would not discharge underwriter from any loss the vessel might sustain on her voyage from Liverpool to Cardiff or from Cardiff to Aden, whither she was bound. And as to the *Peter Maxwell* he thought that the detention of the vessel in St. John, for a purpose wholly foreign to the voyage insured, and while there placing her on the blocks to be reclassed, an operation in no way necessary for, or inci-

dent to, the voyage, varied the risk and was equivalent to a deviation, and therefore discharged the underwriter. On the learned Chief Justice expressing this opinion the counsel agreed that a verdict should be taken for plaintiff on the three policies, to stand or to be reduced, or a nonsuit entered, as the Court might determine.

S. R. Thomson, C. C., obtained a rule *nisi* in Michaelmas Term last, to reduce the verdict or enter a nonsuit.

A. L. Palmer, Q. C., shewed cause in Hilary Term. As far as regards the voyage of the *Mount Pleasant*, from Liverpool to Cardiff and from thence to Aden, there was do deviation, and it was on that portion of the voyage the vessel was lost. The policy attached before the plaintiffs concluded to deviate and go to Chincha. The vessel was lost before she got to the dividing point. The defendant contends that this was a substituted voyage; but I contend the plaintiffs did not intend to abandon the voyage to Aden, and only intended to deviate after the vessel should reach Aden. The defendant refused to sign the permission indorsed on the policy to go to Chincha, and I contend that this being the case the plaintiffs were not bound to go to Chincha, all the underwriters not having consented. This was only a permission as far as it went; if the vessel went to Aden and deviated and was lost, defendant was not liable, but the others were. It must be borne in mind that the evidence was distinct and plain that the vessel was to go to Aden, beyond that he had only a permission to deviate. The fact of her being chartered to Chincha makes no difference. Marsden *v.* Reed, (3 East 571), is quite decisive on this point. Bottomly *v.* Wood, (5 B. & C. 210), is also in point. If a vessel clears for another port, that is an abandonment of the voyage, but if this is not done a mere intention to deviate does not vitiate the policy. Neither does a permission to deviate, not acted on, amount to a deviation. As to the *Peter Maxwell*, I contend that it was a question to be submitted to the jury, whether the risk was materially altered by the vessel being detained seventeen days in St. John, for the purpose of being repaired and reclassed. I think a slight change which does not increase the risk does not affect the policy. [RITCHIE, C. J.: I think there was any thing but a slight change in so long a detention. I had a strong opinion in regard to the matter at the trial, for I thought it a deviation and that the risk was increased, but I would have left it to the jury to find whether such was the case had I been asked to do so. I thought that Mr. Reed should have told the underwriters that the vessel was coming to St. John to be reclassed, and have obtained leave on the policy to detain her in St. John. She was fifty-one days in St. John, being detained seventeen for reclassing. Under these circumstances, there

being an original intention not to go the round voyage as set out in the policy, but to remain in St. John for repairs, I thought the policy was void.] I think the risk was not increased by the delay. The simple point raised is one of deviation and whether the policy was valid. A slight deviation will not invalidate, the test being whether the risk was increased or not, and this was a question for the jury to determine.

S. R. Thomson, Q. C., contra. I agree with Mr. Palmer that it was a question for the jury whether the risk was increased by the detention or not, but he did not ask it to be left to them. I also think that the question as to the *Mount Pleasant*, whether there was a deviation in that case, should have been left to them, but the moment his Honor the Chief Justice ruled as he did, I acquiesced. Under Langhorn *v.* Aulnet, (4 Taunt, 511), whether this act, which is complained of as a deviation, is within the scope of the policy or not, is a question for the Court. In this case the Chief Justice decided that it was not within the scope of the policy to class the vessel in St. John, and if this was a question of law at all the ruling was correct. With reference to the *Mount Pleasant*, it was clearly a question for the jury, whether the vessel started on a different voyage from the one insured against or not. The defendant, as insurer, had a right to have his terminus *a quo* and *ad quem* stated in his contract. Mr. Reed, after the contract of insurance was made, found that his vessel was chartered to the Chincha Islands, and obtained leave from some of the underwriters to substitute Callao and the Chinchas for Burmah and the East Indies. This was as much a change of the contract as if it had been written in the body of the policy. I contend that this was an entire alteration of the contract and voyage, and that defendant is discharged, just as much as if the body of the policy had been altered without his consent. This is totally different from the case of an intention to deviate. [RITCHIE, C. J.: In the policy the underwriters are not joint contractors, but each party contracts separately.] The difficulty here is that the plaintiffs started the vessel on an entirely different voyage from the one insured. In Wooldridge *v.* Boydell, (1 Doug. 17), it is held that where there is an intention to deviate it avoids the policy, even if the loss takes place before arriving at the place of deviation. [RITCHIE, C. J.: Yes, if the terminus *ad quem* is not engrafted on the policy.] Why should that make a difference? [RITCHIE, C. J.: Hare *v.* Travis, (7 B. & C. 14), settles the point.] The deviating point here was Aden. It is a fallacy to call a touching place, such as Aden was in the policy, a terminus *ad quem*. It was merely a stopping port. Tasher *v.* Cunningham, (1 Bligh P. C.

87), is exactly in point with this case. In the case of Marshall v. Reed, (3 East, 571), mentioned by the Chief Justice, I think the judgment of Lord Ellenborough is in my favor.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

This was an action brought to recover the amounts under-written on three policies of insurance, two on the *Mount Pleasant* and one on the *Peter Maxwell.* The policies on the *Mount Pleasant* were dated the 27th September, 1865, and 7th October, 1865, and were under-written by defendant for $400 and $600. By these policies, plaintiffs were insured on the *Mount Pleasant* at and from Liverpool to Cardiff, while there, and thence to Aden, while there, and from thence to a port of loading in India or Burmah, and thirty days after arrival, with leave to call at a port for orders. On these policies was endorsed a memorandum, "Permission is hereby given for the ship *Mount Pleasant,* insured under the policy hereto annexed, to use Callao and Chincha Islands instead of India and Burmah, as expressed in the condition of the said policy." This was signed by some of the underwriters, but not by defendant, who, when applied to, refused to assent to the proposed alteration. The plaintiff says in his evidence, "The *Mount Pleasant* was, I presume, in Liverpool when policies were taken out. I don't know when she sailed from Liverpool. Four, five or six weeks after I got the policies, I went to Thomas and Wetmore to get the endorsement made, but wanted to get liberty to change the termination of the voyage, to have liberty to go from Aden to Callao, instead of to India or Burmah, and I got liberty from all but defendant. Wetmore said he would not consent. I said Mr. Weldon was good as far as Aden, at any rate. I considered I had him till the turning off point, at any rate. I do not know whether she had started on her voyage from Liverpool before we made the change or not. When I got the signature of the underwriters to this permission, my intention was that the ship should go to Callao and not to India or Burmah, and when I did get the policy I did intend she should go from Aden to Burmah or India. We found she was chartered for Callao and we got this permission." On his re-examination, he says, "There was a charter from Liverpool to Aden, and Mr. Kaye made a charter from Chincha to Liverpool; she sailed under the charter to Aden and this was never altered. The vessel was fixed to go to Aden under any circumstances. I withheld no information." On cross-examination, he says, "She did not sail under the charter made by Kaye from Chincha to Liverpool. I believe when she sailed from Cardiff the intention was to proceed to

the Chinchas after discharging at Aden, and not to go to India or Burmah." The only other witness examined as to the change of voyage was James L. Dunn. He says: "I saw the *Mount Pleasant* in Liverpool in 1865, in September, I think. Mr. James Reed was there also; he said she had got a charter for coals for Aden, I think." Re-examined. "I think she was to go from Liverpool to Cardiff and from that to Aden; it was coals she was to carry from Cardiff to Aden." On the passage from Cardiff to Aden she met with the loss now sought to be recovered, the payment of which defendant resists on the ground that the voyage was changed and he was thereby discharged from liability on the policies.

The policy on the *Peter Maxwell* was on a voyage from Dundee, Scotland, to St. John, N. B., and thence to a port of discharge in the United Kingdom, not east of London, and thirty days after arrival, with leave to call at a port for orders; beginning adventure at and from Dundee aforesaid. As to this risk, Mr. Reed says: "*Peter Maxwell* came out here from Dundee, and loss was going home; she was here fifty-one days. I think she was 1343 tons register; she was loaded with lumber here. * * * *Peter Maxwell* sailed from St. John 28th November, after remaining here about fifty-one days. The premium is for the round voyage. The vessel remained here to be classed; she came out to be reclassed, that was the object of bringing her out here. She came out specially for that purpose. We detained the vessel seventeen days for reclassing longer than she would have been detained, in the ordinary course of a voyage, had she come here discharged and loaded in the usual way. She was seventeen days on the blocks. She had about seven hundred tons of coal in, if I remember right; could not have gone on the blocks in three days from her arrival. She was twenty-one days loading, seventeen on the blocks, and remainder would be for discharging. I never heard of any protest against this delay until after the loss." On re-examination, he says: "A classed vessel is a better risk than an unclassed; she only required reclassing. The probability is they would charge a greater premium starting three weeks later."

This claim was resisted on the ground that the detention of the vessel in St. John for the purpose of classing her was a deviation. A motion having been made for a nonsuit, the learned Chief Justice intimated that as to the *Mount Pleasant* he thought the abandoning, or the intention to abandon, the voyage from Aden to Burmah would not discharge the underwriters from any loss that the vessel might sustain, on her voyage from Liverpool to Cardiff or from Cardiff to Aden, whither she was bound, and as to the *Peter Maxwell* he thought that the detention of the vessel in St. John for a purpose wholly foreign to the voyage insured, and while there placing

her on the blocks to be reclassed, an operation in no way necessary for, or incident to, the voyage, varied the risk and was equivalent to a deviation, and therefore discharged the underwriter. On the counsel hearing this expression of opinion, it was agreed that a verdict should be taken for the plaintiff on the three polices, to stand or to be reduced, or a nonsuit entered as the Court might determine. It cannot be doubted that the meaning of the contract of insurance for a voyage from one port or place to another, and thence to another, in other words, for the voyage or voyages named in the policy, is that they shall be performed with reasonable diligence and without unnecessary delay, that is, with all safe, convenient and practicable expedition, and in the regular and customary track, and any unjustifiable deviation or delay discharges the underwriter from subsequent losses, because, if votuntary or without necessity, it is the substitution of another risk and determines the contract. This is an elementary principle of the law of insurance. Now with reference to the *Mount Pleasant* we think plaintiff is clearly entitled to recover for the loss in this case. We think there was a clear inception of the voyage insured. The vessel sailed on the voyage for which she was chartered, and on the voyage insured, viz., from Liverpool to Cardiff, and from thence to Aden, with the intention, no doubt, of dropping the subsequent port, that is, of abandoning the subsequent portion of the voyage for which she was insured, viz., from Aden to a port of loading in India or Burmah, it being clear that she sailed with the intention, after fulfilling her charter to Aden, of proceeding to the Chinchas instead of India or Burmah. This, we think, the assured, if he chose, had a right to do; he thereby simply relieved the defendant from this liability on his policy, but his intention to go from Aden to the Chinchas and his subsequently acting on that intention would not, in our opinion, relieve defendant from the payment of any loss accruing while the policy attached, and while the vessel was in the course of proceeding in due order to the places named in the policy. It is no more than the plaintiff shortening the risk by the omission of one or more of the *termini ad quos*. The only possible complaint here can be that plaintiff diminished defendant's risk by performing a portion only of the voyage insured, and abandoning the rest. This defendant contends he had no right to do; but his contention is opposed, in our opinion, to principle and express authority. In Marsden *v.* Reed (3 East 572), the risk insured was "At and from Liverpool to Palermo, Messina, Naples and Leghorn, provided the French should not be at Leghorn. On loss by capture defendant paid the premium into court. Soon after effecting the policy intelligence was received that Leghorn was in the hands of the French, and the ship took in goods and cleared out

for Naples only, and had no goods for any other place on board. She was captured with the goods insured on board by the French in the Bay of Biscay, and consequently before the dividing point." On the counsel arguing that the voyage insured was to Naples (Leghorn being in the hands of the French), by the way of Palermo and Messina, LeBlanc, J., interposed and said, "Suppose the ship had cleared out for Palermo only, and manifestly intended to go there only and no further, was it the intention of the underwriter that the policy should not attach unless she went to all the other places?" In reply to this question the counsel says: "Though it were competent to the assured after such a policy to go to Palermo only, or after going to Palermo to stop at Messina without proceeding to Naples, because the order named in the policy would still be preserved as far as the voyage was pursued, he contended that it was not competent for him to omit either of the places first named and to go direct to the further terminus, for by doing so the course of the voyage insured is altered and another substituted in the room of it." And Lord Ellenborough, in delivering his judgment, says: "This is not a question of deviation, to raise which, it must be assumed, that the voyage insured was commenced and that the ship afterwards went out of her track on that voyage. But there is no question of that sort here. The loss happened before the dividing point to any of the places named in the policy. . The only question is whether there was any inception of the voyage insured, and I am clear that there was.. I think that the voyage insured to Palermo, Messina, and Naples, meant a voyage to all or any of the places named, with this reserve only, that if she ship went to more than one place, she must visit them in the order described in the policy. That was the clear meaning of the parties. The assured must only not invert the order of the places as they stand in the policy." And again he says: "For the purpose, however, of this argument I will assume it as a fact that the ship was only going to Naples, and then I say that upon the true construction of such an assurance as this the assured is at liberty to drop any of the places named, but that if he go to more than one he must take them in the order named in the policy." Grosse, J., says: "This is a question of inception of the voyage, and although *non constat* that the ship was upon her voyage to Naples, by way of Palermo and Messina, when she was captured, yet I will take the fact to be that she was on her voyage to Naples only. There it was objected that this was not the same voyage described in the policy. But it could not be denied that if the ship had sailed for Palermo only, as put by my brother Le Blanc in the course of the argument, it would have been within the policy, and if so in principle I cannot distinguish that principle from this, for the objection

would equally hold that it was not the same voyage described." Lawrence, J., says: "It is admitted that if the ship had cleared out for the first place named in the policy, the risk would have commenced, although there had been no intention of prosecuting the voyage further. Then there is an end to the objection, that the voyage commenced is not identified with the voyage insured."

This doctrine here decided is adopted by the Court of Exchequer, in Ashley *v.* Pratt, (16 M. & W. 471), in which case Pollock, C. B., says: "At the bar the cases of Beetson *v.* Haworth, (6 T. R. 571); Marsden *v.* Reed, (5 East 572); Gairdner *v.* Senhouse, (3 Taunt. 16); Bragg *v.* Anderson, (4 Taunt. 229); Sally *v.* Whitmore, (5 B. & Al. 45), and others, were cited to illustrate the doctrine upon this subject of alleged rules of deviation, and no doubt where a voyage is described to specified ports, as from A to B and B to C, and especially where such is the regular course of the voyage, it is a deviation to go to C before B, and if the voyage be intended for both, Marsden *v.* Reed decided that such a vessel need not go to all the ports, but she must take such as she sailed to, in the order named in the policy." This case was affirmed in the Exchequer Chamber, (1 Exch. 257), and is, in our opinion, conclusive in the case before us.

As to the *Peter Maxwell*, we think the question is, has there been any voluntary, extraordinary delay, not justified by necessity or any thing equivalent to necessity. In Smith *v.* Surridge, (4 Esp. 25), Lord Kenyon said, "that if there was any voluntary delay on the part of the plaintiff there is no doubt it would avoid the policy." In this case it is not only proved by plaintiff himself that there was, but also that there was a change of the position of the vessel after her arrival in the harbor of St. John, from where she could to where she could not take in her cargo, or pursue her voyage in its ordinary course; and that this continued for the space of seventeen days. Now, in the words of 2 Greenleaf on Ev. § 403, the defence of deviation is made out by proof that there has been a voluntary departure from, or delay in the usual or regular course of the voyage insured, without necessity or reasonable cause." And this is, no doubt, strictly accurate, for deviation is not only a departure from the course of the voyage, but it is any material departure from, or change in, the risk insured against, without just cause. It is not necessary that the change in the risks should increase them. The parties agree that the insurers shall assume certain risks and no others, and the assured has no right to substitute any others in the place of those assumed, whether they be greater or smaller. This the case of Hartly *v.* Buggins, decided by Lord Mansfield in Michaelmas, 22 Geo. III., reported in Park 513, clearly decides. This case is referred to by Tindall, C. J., in Mount *v.* Larkins, (8 Bing. 121). He says, "that

an unreasonable delay in commencing the voyage insured against, after the policy has actually attached, discharges the underwriter from the policy, appears not only from the reason of the thing itself, but from the opinion of Lord Kenyon in Smith v. Surridge. * * * Again, that an unreasonable delay in performing the voyage insured is equivalent to a deviation was expressly ruled in the case of Hartly v. Buggins, where a ship insured at and from the coast of Africa to the West Indies, with liberty to exchange goods and slaves, stayed three months beyond the usual stay of ships in that trade. The Court of King's Bench decided this was equivalent to a deviation, and Lord Mansfield said the single point before the Court is whether there has not been what is equivalent to a deviation, whether the risk has not been varied, no matter whether the risk has or has not been thereby increased. The same principle is admitted in the cases of Vallance v. Dewar, (1 Camp. 503), and Ougier v. Jennings in a note to that case." "The reason," Tindal, C. J., goes on to say, "upon which a deviation discharges the insurer, is not that the risk is thereby increased, but because the insured has without necessity substituted another voyage for that which was insured, and thereby varied the risk which the underwriter took upon himself." In this case the voyage was insured from Dundee, Scotland, to St. John, New Brunswick, and thence to a port of discharge in the United Kingdom, that is to say, she was, with all reasonable despatch, to proceed from Dundee to St. John, there unload, and load a cargo, and return to a port of discharge, etc. Instead of which she sailed to St. John from Dundee, but did not there proceed to discharge her cargo and take in another, with a view of sailing to a port of discharge, but after unloading her cargo, without necessity went on the blocks, for a purpose wholly foreign to the voyage, where she remained seventeen days, in a position which not only rendered it impossible for her during that time to take in a cargo or pursue her voyage, but, necessarily, materially varied and materially increased, during all that time, the risk, for it is self-evident the risk of a vessel on the blocks, undergoing the examinations, additions and alterations incident to the process of repairing, must be materially different from that of a vessel afloat pursuing her voyage, because, independent of every other consideration, there is the same risk of the voyage, and the risk of the vessel in the position where she could take in cargo, and prepare for her voyage, with the additional risk of going on the blocks, remaining there in the hands of the shipwrights and artizans, coming off the blocks and returning to the position she left when she departed from the direct course of her voyage, to say nothing of the increased time for which the liability of the underwriter would attach, and the later season of the year at

which the return voyage would have to commence, and of which the plaintiff himself said, "the probability is, they would charge a greater premium, starting three weeks later," But it has been urged that this was a question for the jury, and not for the Judge. It was not at the trial asked by either party to submit any questions to the jury, but on the learned Chief Justice expressing his opinion, a verdict was taken by consent for the plaintiff on the three policies, to stand, or be reduced, or a nonsuit entered, as the Court might direct. In Morgan v. Couchman, (14 C. B. 100), Williams, J., says: "I am of opinion that it is not competent to counsel, after making a stand upon a point of law, to fall back upon the evidence, and afterwards say that the matter ought to have been submitted to the jury." And in Caterall v. Hindle, (L, R. 2 C. P. 368), Kelly, C. B., says: "I should be extremely sorry to interfere with the general understanding of the bench and bar, that a new trial will not be not be granted on the ground that a question has not been left to the jury, when the party interested in it has not asked the Judge to leave it to them." But apart from this, is there not a clear, distinctive, unreasonable and unjustifiable delay? Unreasonable delay is properly a question for the jury; unjustifiable delay, a question of law for the Court. That is to say, delay in the one case would not avoid the policy, because the object of the delay was consistent with, or in furtherance of, the objects of the voyage, unless such delay was for an unreasonable time; in the other, the delay would vacate the policy, because the delay was for a purpose foreign to the voyage, and therefore wholly unwarranted. If this delay is capable of explanation and turns on the question of its reasonableness in and being incurred for the purpose of the voyage, then, clearly, it is a question for the jury, as where it is alleged there has been unreasonable and unnecessary delay in loading or discharging a cargo, or in the despatching of a vessel, when loaded. But in this case, there were no facts in dispute to leave to the jury, and the only question seems to us to be, was there any voluntary extraordinary delay not justified by necessity or any thing equivalent to necessity, and this, if the case had gone to the jury, it seems to us, the Judge would have been bound to tell the jury was undisputed and in fact admitted, and therefore that plaintiff having voluntarily placed his ship without necessity on the blocks which removed her from the course and absolutely prevented her from pursuing her voyage, for a period of seventeen days, thereby varied the risk and did that which was equivalent to a deviation, and so avoided the policy. This was the view taken by the learned Chief Justice at the trial. The burthen of the plaintiff's contention is, that the risk on a reclassed vessel on the voyage, would not be as great as on one not reclassed. This, if so, is just what we think

plaintiff had no right to impose on defendant, and should not have been submitted to the jury, because, whether greater or less, plaintiff had no right, by altering the course of the voyage, to change the risk, and defendant has a right to say that it was not the contract he entered into. Plaintiff had no right to initiate a risk in port and a voyage at a different time to which defendant had not assented, and then claim by way of set off that when that risk was over and the voyage resumed, defendant's position would not be altered. In Langton v. Allant, (4 Taunt. 512), Gibbs, J., says: "Now was this stay in the meantime a purpose within the scope of the adventure? Whether it was or not, is not for the consideration of the jury; it is a question solely for the consideration of the Court. Whether the ship stayed an unreasonable time or not, for that purpose, was a question for the jury." That is to say, if the purpose was within the scope of the adventure, delay is not equivalent to a deviation, unless it be unreasonable, and whether reasonable or unreasonable, it is to be determined not by any positive and arbitrary rule, but dependent on the state of things existing at the place where the ship happens to be; for a reasonable time, for the purposes of the adventure insured, must be allowed. In Inglis v. Vaux, (3 Camp. 437), the policy was on the ship, at and from Liverpool to Martinique, and all or any of the windward and leeward islands. "The ship arrived at Martinique; the captain disposed of his outward cargo, except a small quantity of lime and bricks. With these he sailed for Antigua, where she was lost. The captain said he stopped at Antigua, partly to dispose of the outward cargo and partly to procure a homeward cargo. Lord Ellenborough ruled that the captain had no right to mix up together the two objects, of disposing of the remnant of the outward cargo and procuring a homeward cargo, at the risk of the underwriters on the outward voyage, and when the disposal of the outward cargo ceased to be the sole reason of his stay at Antigua, these underwriters were discharged, and so in many other cases.*

*Weldon, J., being related to defendant, took no part.

THE QUEEN *v.* THE JUSTICES OF WESTMORLAND.

In re WILSON.

APRIL 17th, 1869.

Where in a bastardy case by consent of counsel a single Justice tried the matter alone and afterwards made an order of affiliation, the Court held that a Court could not be constituted by consent, and ordered the proceedings to be quashed.

Held, also, that the Court not being properly constituted there was no trial at all, and the party was required to enter into recognizances to answer the charge before the sessions.

D. L. Hanington, in Michaelmas Term last, shewed cause against a rule *nisi* for a *certiorari* to remove the proceedings in this case for the purpose of quashing the order of affiliation of bastardy made by James W. Chandler, Esquire, against Wilson. The affidavits disclosed the fact that the matter came on at sessions, Justices Chandler and Charters being on the bench. The latter stated that he could not well remain, having important business to transact, and no other Justice being present, by consent of the counsel on both sides, Justice Chandler proceeded to try the matter alone, and an order was made against Wilson, and the objection was then taken that the Court being improperly constituted had no jurisdiction. He contended that defendant's counsel having consented to the Court thus constituted acting, and the order appearing on the records as made by the Court when two Justices were present, according to the agreement, and the writ of *certiorari* being in the discretion of the Court, the Court will not allow the party to take advantage of his own wrong or to object to a proceeding taken by his own consent. The authorities are clear that when a Judge is interested consent will waive any objection to jurisdiction.

B. Botsford, contra, was not called on.

Per Curiam. A Court cannot be constituted by consent, for it cannot give jurisdiction where the constitution of the Court is inherently defective. A matter of form may be waived by consent where the Court is properly constituted, but here there is an inherent defect, one Justice sitting instead of two, and the whole proceeding is such that it could not be sustained on principles of public policy. The rule must be made absolute.

Return having been made a rule *nisi* was obtained to quash the proceedings.

D. L. Hanington, in Hilary Term, contended that before the Court made an order absolute to quash the proceedings, they should compel the party to enter into recognizances to appear at the next sessions. 1 Burns Jus. 387 shewed this had been the practice in

England. Rex. *v.* Gibson (Wm. Black, 198). He submitted that in the interests of public justice it was necessary the party should be bound over to appear.

G. Botsford, contra. This is certainly a novel application. It would be a gross injustice to try this man twice for the same offence. There is no modern case that can be cited to shew that a man should be required to enter into recognizances in a case like this.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

It appears to be the practice in England, that a rule *nisi* for a *certiorari* to quash an order in a bastardy case, cannot be argued unless the defendant is in Court. See Rex *v.* Price (6 T. R. 148); Rex *v.* Matthews (Salk, 475).

In Rex *v.* St. Marys Nottingham (13 East 57 *n.*) where an order of bastardy was quashed, the Court said it was the course always on quashing an order of bastardy to take a recognizance of the reputed father to appear at the next sessions; and in Rex *v.* Gibson (1 Wm. Black, 198), where an order of bastardy was quashed, the defendant entering into recognizance to abide the order of the sessions below, the Court said that was the reason why the personal appearance of the defendants was in these cases always required. So, in Burn's Just. 387, it is said that the Court used, before the 2 and 3 Vict., c. 85, when it quashed the order as bad, to bind the defendant to appear at the next sessions, and abide their order and Bac. Ab. "Bastardy," [E] vol. 2, p. 97.

But upon the removal of the case by *certiorari* the Court of King's Bench may either reverse the order in whole or in part, and though they reverse the order for irregularity yet will they oblige the father to give security to appear at the next sessions to abide such further order as shall be made. It is for this reason that the personal appearance of the defendant is required on a motion to quash an order.

The case of the Queen *v.* Gaunt (Law R. 2 Q. B. 466) confirms the doctrine, and decides that a person's dismissal on the merits is no bar to the matter being re-heard, though when the dismissal is upon the merits, the Justice, on any subsequent application, should defer so much to the former decision as to treat the matter as *res judicata*, unless it be shewn that what may be called the first trial was, for some reason or other, not fair. But in the present case there was no trial at all. The Court was not properly constituted; in fact it was no Court; and therefore it would be most unjust to suffer the de-

fendant to depart without entering into recognizance to answer the charge before the properly constituted tribunal. The English practice is, in our opinion, most reasonable, and entirely applicable to this country, and will be hereafter acted on as the settled practice of this Court.

Rule absolute to quash the order on the defendant entering into recognizance to appear at the Westmorland Sessions to answer the charge.

GILBERT *v.* CAMPBELL.

APRIL 17, 1869.

Where a party to a contract disables himself from performing it, the other party's right of action for the breach immediately attaches

The sufficiency of preliminary evidence of the loss of a document to entitle secondary evidence to be received is a question for the Judge at the trial to determine.

Where a commission for the examination of witnesses abroad was issued directing the depositions to be taken before four commissioners, one of whom, though notified, did not attend, and the commission was executed by the other three, in the absence of any protest at the time, or suggestion that defendant had been injured by its execution by three only, and where he had an opportunity of applying, at term, to suppress the depositions, the Court held that the objection was waived and it was too late to object to their reception in evidence at the trial.

A party cannot make evidence for himself by a letter written to the opposite party, containing a statement of the damage he has sustained by reason of that party's breach of contract, and a letter written to plaintiff by his attorney containing a statement of the damages plaintiff had sustained from defendant's breach of contract, is inadmissible in evidence.

A plaintiff in equity before decree has the power to discontinue his suit, and where a breach of his contract results from his not doing so he is liable.

In an action for breach of defendant's contract to assign certain judgments and mortgages on plaintiff's property to him, the latter cannot recover damages for injury done to his business and credit, in consequence of the sale of his property under a decree in equity.

This was an action brought to recover damages for breach of an agreement entered into between plaintiff and defendant, tried before WELDON, J., at the Westmorland Circuit, in July, 1867. The agreement, the declaration which contains the history of the case, and the material facts, are fully set out in the judgment of the Court. A verdict having been found for plaintiff,

S. R. Thomson, Q. C., in Michaelmas Term, 1867, obtained a rule *nisi* for a nonsuit or new trial, on the following grounds:—For nonsuit. 1. That there was no evidence of a proper deed of assignment having been tendered to defendant. 2. No proof of tender of the

money by the plaintiff. 3. If there was proof of tender of a deed of assignment to the defendant, it was not such a deed as he was bound to execute. 4. That the conditions precedent on the part of the plaintiff not having been performed, the defendant was excused from the performance of his agreement, he not having paid the money to defendant on the day required. 5. That plaintiff did not insure the property, as required by the fifth clause of the agreement, he having insured in Campbell's name instead of in his own, and assigning to Campbell, as required. 6. That no assignment could be made by defendant until the time for payment had elapsed, according to the agreement, which was on the 1st of August, 1867, and after the action commenced. 7. No evidence of special damage on the part of plaintiff, or of malice on the part of defendant. 8. That the insurance company were bound and entitled to an assignment of the mortgage. 9. No evidence of the agreement, the secondary evidence being improperly admitted.—For new trial. 1. Improper admission in evidence of the commission executed at Glasgow, before three commissioners, it being directed to four. 2. Improper admission of conversations between the plaintiff and Bell, prior to the agreement. 3. Improper admission of plaintiff's evidence as to his business and loss of credit, in consequence of the sale of his property, under the decree in Equity. 4. Improper admission of the letter from plaintiff to defendant, containing a statement of the damages he had sustained and of the letter from plaintiff's attorney to him, and statement of damages attached. 5. Improper admission of the Judge's order for the commission. 6. Improper admission of Moore's evidence as to the plaintiff's credit, he having been only called to produce a paper. 7. That the verdict on the first count was against evidence, and the Judge's charge, and that the damages were excessive. 8. That the verdict on the second count was against law, evidence, and the Judge's charge.—Misdirection in telling the jury. 1. That a plaintiff in a suit in Equity could discontinue the suit, and that it was the duty of the Campbells to do so under the agreement. 2. That the plaintiff was entitled, upon payment, to an assignment by defendant. 3. As to payment by the plaintiff. 4. In leaving to the jury whether the payment of the £250 was made by Lingley on account of the plaintiff, and also in stating that the plaintiff's letter to Jack, of the 1st August, did not put an end to his interest, that letter being an authority to assign to Lingley. If plaintiff has made an assignment to a third party, he cannot come into this Court and claim substantial damages. 5. In stating that the letter and telegram of Mr. Wetmore to Jack did not authorize him to proceed with the Equity suit and bind the plaintiff.

A. L. Palmer, Q. C., with him *Wetmore*, A. G., and *D. L. Haning-*

ton, shewed cause. As to the first three grounds for nonsuit, it is quite clear that there were independent covenants. Defendant was not bound to assign until he got his money, and plaintiff was not bound to pay at any particular moment, but at the time he did defendant was bound to assign. We tendered the money to Mr. Weldon and to Mr. Jack, although there is no direct evidence of tender to defendant except by the commission. But there was no necessity for a tender at all, the breach was complete without it. Stavers *v.* Curling (3 Bing. N. C. 355), the defendant having incapacitated himself from performing his contract, he is liable to an action without performance by plaintiff. This covers the 3rd, 4th, 5th and 6th points. As to the 7th [RITCHIE, C. J.: I do not care to hear you on the point that it is necessary to prove special damage or malice, if you prove a breach of the contract; I do not think it is.] As to the 8th, the interest of the insurance company, if they have any, cannot affect plaintiff's right of action. 9. With reference to the secondary evidence of the agreement being improperly admitted, there were two duplicate originals; one was taken by plaintiff, the other by Jack or Bell, for defendant. Plaintiff swears he lost his, but had taken two examined copies of it. We proved the other copy in the hands of Jack or Bell, and that they had full notice to produce it before the trial; this they did not do. As to the grounds for new trial. 1. The commission was properly received in evidence, and if not, all the commission proves is immaterial or proved by other evidence, so that if the verdict had been the other way without this, it would have been set aside as against evidence. But it is perfectly good if executed only by three commissioners, although directed to four, for it is the order of the Judge which gives it vitality. 2. Rev. Stat. 336. Notice was given to all the commissioners, but one of them did not attend. The attendance of three was sufficient, Simms *v.* Henderson (11 Q. B. 1018), and Nichol *v.* Allison (1006 same vol). 2. The conversations between Bell and plaintiff, prior to the agreement, were properly received in evidence to shew the circumstances existing at the time it was made. Hadley *v.* Bloxender (9 Ex. 353) shews that evidence of what took place and what was known to both parties and said at the time the contract was made is proper evidence. 3. The plaintiff's evidence of his loss of credit was proper, and the question whether it was caused by the breach of the contract was for the jury. 4. We contend the letter from Mr. Palmer to plaintiff was properly received; our object was to shew by it the state of the parties at the time the action commenced. The whole doctrine is discussed in 1 Taylor on Ev. 694, § 734 and 5. Gaskill *v.* Skene (14 Q. B. 664). [RITCHIE, C. J.: How can such a letter as that be evidence against the defendant?] A new trial cannot be

granted even where the evidence is improperly admitted, if the same thing is proved by other evidence. 5. The Judge's order, as one of the papers in the cause, was entitled to be received. 6. As to the cross-examination of Moore as to plaintiff's credit, he having only been called to produce a paper. 2 Taylor Ev. 1216. 7. The damages were not excessive, they were much less than plaintiff proved he actually sustained.—As to the points of misdirection. 1. It is quite immaterial whether the defendant had power or not to discontinue the suit in equity, but he had the power, and whatever is involved in the agreement he was bound to do by law. 2 Parsons on Con. 673. The second and third points have been already discussed. 4. As to the effect of the alleged assignment by plaintiff to Lingley. Even if there had been an equitable assignment it would be no answer to this action, for it would not affect our legal right. 5. As to the effect; Mr. Wetmore's letter and telegram, as solicitor, he had no power to make an agreement to bind plaintiff, because the authority had been withdrawn.

S. R. Thomson, Q. C., and *C. W. Weldon*, contra. Under the pleadings in this case the plaintiff cannot recover. The defendant agreed to take no further proceedings voluntarily, but the breach charges "that contriving and intending to injure," &c., which is not true, for defendant was forced on by Neil. Our contention is that we did not break the agreement, and if we did, the pleadings will not sustain the verdict. In this case the plaintiff had no power to discontinue. We were forced to break the agreement, and did it by the advice and consent of the plaintiff's solicitor, Mr. Wetmore, and we contend that he had power to bind plaintiff and deny that the authority of a solicitor in equity is less than that of an attorney at common law. He was clearly plaintiff's solicitor until he took his name off the record, and his telegram was clearly a consent that a decree should be obtained. Swinton *v.* Swinton, (18 C. B. 498). Gilbert did not perform his part of the agreement by the payment of the sums of money specified on the days they came due, and before an action can be maintained on this agreement, it should state in the declaration, and be proved, that the plaintiff performed his part of it, the payment of the money being a condition precedent. Neal *v.* Ratcliff, (15 Q. B. 916); Hughes *v.* Tendall, (8 C. B. 97). The commission was improperly received in evidence, and cannot be sustained by the order of the Judge; the commissioners act by the authority of the commission alone. The letter from Mr. Palmer to plaintiff was clearly inadmissible, it was a species of manufactured evidence forced in to the prejudice of the defendant. The plaintiff cannot now shift his ground and shew the evidence admissible, on a

ground different from that taken at the trial. This was virtually decided in Key v. Thomson, (*ante* 297). In Gilbert v. Palmer, (1 Allen, 667), we find the same objection as to the admissibility of such evidence sustained. They contend that it had no effect on the jury, but it will be found that the finding followed it, and the Attorney General, in his address, requested the jury to take down the figures from it. The jury were expressly told by the learned Judge not to find damages for the loss of credit, but in the face of this they found £590. That jury, we may infer, went into the box to find for plaintiff, and their verdict is not to be relied on. Such damages cannot be recovered in an action of this kind, and the damages on the first count were also excessive, and you cannot do justice by merely throwing away the amount of the excess in this count, for if they gave such large damages they did not approach the case with that proper mind they should have had, and, therefore, they shew that they were an improper tribunal, and we are entitled to a new trial. Hedley v. Thatcher, (8 C. & P. 388).

Cur. adv. vult.

ALLEN, J., now delivered the judgment of the Court.

This was an action brought to recover damages for breach of the following agreement: "It is agreed between James Campbell and Wm. Campbell and William J. Gilbert, as follows: The said Wm. J. Gilbert admits for the purpose of securing to the said W. and J. Campbell, that there is due to the said W. and J. Campbell by him upon the mortgage made by him to Samuel Neil, assigned to William Jack, by way of mortgage in trust for J. and W. Campbell, the whole amount of the debt of £1,338 19s., sterling, mentioned in the said assignment as owing by the said Samuel Neil to J. and W. Campbell with interest, and now agrees that in case default shall be made by the said William J. Gilbert in payment of the instalments hereinafter mentioned, or any part thereof, or of the interest thereon, the injunction obtained in the Supreme Court, in equity, in the suit of William J. Gilbert against Samuel Neil and William Jack, to restrain them from selling the lands and premises mentioned in the said mortgage, shall be dissolved, and the said lands and premises shall be forthwith liable to sale under the provisions of the said mortgage and assignment.

2. And whereas, the said J. and W. Campbell now hold a *cognovit actionem* of the said Samuel Neil for £1,928, with costs, in a suit brought against him in the Supreme Court of this Province, by the said J. and W. Campbell, which *cognovit* includes the said debt men-

tioned in the said assigment of mortgage as due by Neil to the said J. and W. Campbell, and also have a judgment in the Supreme Court against the said Samuel Neil for £1,305 11s. whereon they are entitled to issue an execution for £684 0s 9d., with interest from the 1st day of March, 1861, and £5 11s. costs, and have also a claim against the said mortgaged premises for £72; paid for insurance on the buildings mentioned in the said mortgage.

3. It is now agreed between the said W. J. Gilbert and James Campbell, and William Campbell, that the said J. and W. Campbell are to enter judgment upon the said *cognovit*, and the said W. J. Gilbert is to pay the said J. and W. Campbell as and for the purchase money of the said judgment and mortgage as hereinafter mentioned, the sum of £1,687 10s., lawful money of New Brunswick, with interest from this date by instalments as follows: the sum of £500 on the first day of August, 1864, £500 on the first day of August, 1865, £500 on the first day of August, 1866, and if there shall remain any balance, the same shall be paid on the first day of August, 1867, and is also to pay in cash the sum of £35.

4. And the said J. and W. Campbell on their part agree on payment to them of the said sum of £1,687 10s. with interest, as aforesaid, to assign and transfer to the said William J. Gilbert or his assigns, the said two several judgments and the said assignment by way of mortgage, and all benefit and advantage which may be had therefrom.

5. In the meantime, and until full payment and satisfaction of the said sum of £1,687 10s. with interest, it is agreed between the parties that the said William J. Gilbert is to insure and keep insured upon the buildings on the said premises in some office for insurance against fire, to the satisfaction of the said J. and W. Campbell from and after the 14th day of August instant, a sum of money not less than £1400, or not less than the amount from time to time due and owing to them under this agreement, and shall pay the premiums thereof and keep the policies assigned to the said J. and W. Campbell, and in default of his so doing they may effect such insurance in their own names, and all such premiums of insurance as they shall thereupon pay shall be recoverable against the said W. J. Gilbert with interest, and shall be a further lien upon the said premises, and in case of loss all such insurance monies as shall be recovered and received, shall be applied by the said J. and W. Campbell in payment of the £1687 10s. or such part thereof as shall remain unpaid with interest, and the residue thereof if any, to the said

William J. Gilbert, his executors, administrators or assigns as personal property.

6. And it is further agreed between the said parties that the said William J. Gilbert and his assigns may remain in possession of the the said mortgaged premises, until default shall be made by him or them in payment of the said several instalments or either of them or any part thereof, or of the interest thereon, and that no further proceedings shall be taken by the said J. and W. Campbell for the forclosure or sale of the said mortgaged premises, until such default shall be made by the said William J. Gilbert.

7. And it is further agreed that no claim for costs of this suit is to be made by the said William J. Gilbert against the plaintiff.

8. And it is further agreed between the parties that upon full payment and satisfaction of the said William J. Gilbert to the said J. and W. Campbell of the said sum of £1687 10s. with interest, and upon his performance of this agreement in all other respects, the said J. and W. Campbell shall, at the request and at the costs and charges of the said William J. Gilbert, make and execute to the said William J. Gilbert, or to such person or persons as he shall direct and appoint, such deeds and instruments as shall be necessary, or shall be advised by counsel learned in the law, for conveying, assigning and transferring to him or them the said several judgments, and the said assignment by way of mortgage, for the sole and absolute use and benefit of the said William J. Gilbert, or such persons as he shall appoint, and that the said J. and W. Campbell shall not do any act, whatever, to impair the validity of the said several judgments or either of them, or the said assignment by way of mortgage, or to hinder or prevent the said William J. Gilbert from realizing or having the benefit of the full amount thereof.

9. And in case the said William J. Gilbert shall make default in payment of either of the said instalments or any part thereof, the right of the said William J. Gilbert to the possession of the said mortgaged premises shall thenceforth cease, and he shall deliver up possession to the said J. and W. Campbell or to any person or persons to whom, under the power of sale in the mortgage, the same shall be conveyed.

10. And it is further agreed that the parties hereto shall use their mutual endeavors to obtain payment to be made out of Court to the said J. and W. Campbell, of the proceeds of the cargo of the *Kathinka*, and in case the same is so made, the net proceeds thereof, after deducting the necessary costs and charges of obtaining pay-

ment, when received by the said J. and W. Cambbell, shall be credited by them to the said William J. Gilbert in reduction of the said sum of £1687 10s., with interest. Dated 2nd May, 1863.

JAMES CAMPBELL and
WILLIAM CAMPBELL, by their attorney
DUNCAN BELL.
WILLIAM JACK,
WILLIAM J. GILBERT.

There are two special counts in the declaration. The first recites that the plaintiff in the lifetime of William Campbell was seized in fee of certain lands mentioned in several indentures thereinafter mentioned, made between the plaintiff and Joseph A. Crane, and between the plaintiff and S. Neil, of great value. Being so seized, the plaintiff afterwards, on the 17th October, 1857, made certain notes whereby he promised to pay on the 1st August, 1860, to his own order, £300 with interest, and a similar note for £205 with interest, which notes he endorsed. On the same day, by indenture made between the plaintiff and Joseph A. Crane, he conveyed certain lands to Crane, subject to a proviso, that the conveyance should become void on payment of the said notes, the plaintiff by another indenture of the same date conveyed to Crane other lands, subject to become void on payment of three notes, one for £500, payable on the first of August then next, with interest; the second, for £500, payable on the first of August, 1859, with interest; the third for £205, with interest, being the same note secondly before mentioned. On the 30th July, 1858, Crane assigned the two mortgages to J. V. W. Davidson, and G. W. Smith with the notes. On the 21st February, 1861, Davidson and Smith assigned the mortgages to defendant and William Campbell, and two of the notes, the one for £205 and the one for £300. On the 15th October, 1859, plaintiff conveyed by mortgage to S. Neil the same lands for the sum of £3,500, with interest, on the first July then next, with covenant for payment and insurance on mill, of not less than £2,000, and on the dwelling house not less than £600, with power of sale on giving three months' notice. S. Neil, on the 25th February, 1860, by indenture, after reciting that he was indebted to J. and W. Campbell and Company in the sum of £1,338 19s. sterling, payable in London, for money made payable on or before the 1st August then next, assigned to their attorney, William Jack, the said mortgages.

That defendant and the said William Campbell, in Hilary Term, 24th Victoria, sued Neil, who gave a *cognovit actionem* for £1,926. The same term defendant and William Campbell sued W. J. Gilbert on the two notes for £300 and £205, and recovered judgment against

him for the amount of the notes with interest and costs. On the 22nd April, 1861, defendant, W. Campbell, and Jack, commenced a suit in equity against the plaintiff and S. Neil to compel payment of the said mortgages or for foreclosure or sale. Pending this writ on the 1st December, 1862, the plaintiff paid Campbell £129 1s. 4d. on account of the judgment and costs, leaving a balance of £567 due. The Campbells granted time for payment of the balance until the 1st August then next, upon receiving as security a mortgage from plaintiff and H. T. Gilbert on certain other lands. During the pendency of the suit in equity and before decree, on 2nd May, 1863, the agreement was entered into, in which the suit was brought, and which is set out in the declaration at full length. The declaration then avers mutual promises. It then avers that the plaintiff paid the Campbells £35 in cash in part performance of the agreement, and on the 31st July, 1863, plaintiff paid the Campbells in part satisfaction of the judgment against him £133 19s. 6d., and on the 8th January, 1864, paid the Campbells £34 7s., so that the whole amount then due on the said judgment for principal, interest, damages and costs, or upon the said mortgage to Crane, or the said notes therein mentioned, was £480.

On the 8th January, 1864, plaintiff procured Eliza Crane to pay Campbells the said sum of £480, and they, on the same day, executed to Eliza Crane a deed by which, after reciting the judgment against the plaintiff, the mortgage of H. T. Gilbert and plaintiff to Campbells, and that £480 was due upon the said judgment and mortgage security, the Campbells assigned the said mortgage and judgment to Eliza Crane. That Eliza Crane never afterwards gave defendant or William Campbell any power to take proceedings to collect the amount due on the said judgment or mortgage, and that afterwards the plaintiff paid Eliza Crane the whole amount due on the said judgment and mortgage. On the 1st August, 1864, plaintiff paid Campbells £500. The plaintiff also, from and after the 14th August then next, did insure and keep insured, to the satisfaction of the Campbells, £1,400 upon the premises, and kept the policies assigned to the Campbells, and no claim for the costs of the suit in equity was made by the plaintiff against the Campbells. Breach —that the Campbells after payment of the first instalment of £500, and before the second instalment fell due, and before default was made by plaintiff, took further proceedings for the foreclosure or sale of the said mortgaged premises, and they did an act to impair the validity of the said assignment by way of mortgage, and to hinder or prevent plaintiff from realizing or having the benefit of the full amount thereof, and such proceedings were had on the part of defendant, William Campbell, and William Jack, their solicitor in the

said suit, that by a decretal order made in the said cause, the then Chief Justice, after reciting the hearing on the 5th April, in presence of counsel for plaintiff and defendant Neil, none appearing for defendant Gilbert, now plaintiff, and on hearing the bill of the plaintiffs and the answer of Neil and proofs, assessed the amount due on the identical notes on which the defendant Campbell had received judgment for principal and interest up to the 17th May, at £436 10s., and on the second note before mentioned, at £298 5s. 6d., and on the mortgage in the bill mentioned for principal, interest, and exchange, at £2,158 5s. 6d., and ordered the said mortgaged premises to be sold, and out of the proceeds the Campbells to be paid £436 10s. and £298 5s. 6d., with their subsequent interest and costs, and Jack to be paid £2,158 9s. 6d., with subsequent interest, and the surplus to be brought into Court. Plaintiff then avers that on the 10th July, before the second instalment became due under the agreement, the mill, one of the buildings insured by plaintiff, was burnt, and the Campbells, on the 14th September, received £1,000 more money. That defendant afterwards, on the 28th December, wrongfully procured the barrister to advertise the said property, and on the 15th May, 1866, sold the same for £650.

On the 1st October, 1866, the plaintiff tendered to defendant the residue of the sum of £1,687 10s., and interest, and offered to perform the agreement on his part and requested him to execute a deed conveying the said judgments and assignments by way of mortgage, but the defendant wholly refused to execute the same. By means whereof, the plaintiff lost all his real estate, and the same has been sold for less than the value thereof, and the proceeds have been applied to the payment of a sum of money which the plaintiff had already paid to the defendant. And he has also lost the use of the said assignment, and has been prevented from receiving the sums due on the judgments and assignments by way of mortgage, and the same are wholly lost; and he is otherwise greatly injured and damnified.

The second count sets out that before and at the time of the making of the said agreement, the plaintiff was a merchant, paying his debts with integrity and punctuality; had the good opinion of all his neighbors and was acquiring great gains. It recites the suit brought by the Campbells and Jack against the plaintiff and Neil on the said mortgages, and that plaintiff, finding the continuation of the suit likely to injure his credit, for the purpose of putting an end to the said suit, entered into an agreement with the Campbells, which agreement is set out. It also avers mutual promises and part performance of the agreement by the plaintiff by payment of £35 cash and of £500. It avers that the plaintiff did insure and keep

insured the premises from the 14th day of August, for $1400, and assign the polices to the Campbells; and that the plaintiff made no claim for the costs of the suit in equity. That before the second instalment became due, the building insured was destroyed by fire. Defendant received £1000 insurance money in payment of the sum then remaining unpaid. Breach, that the defendant intending to injure plaintiff in his good name and credit, and bring him into scandal, &c., with his neighbors, and to cause them to believe that he was poor and unable to pay his debts, and that defendants, W. Campbell, and W. Jack had a right to obtain a degree in equity for sale of his real estate, and that he was indebted in the large sum mentioned in the decree, &c., after payment of the first instalment and before the second became due, took further proceedings for the foreclosure and sale, &c., and did an act to impair the validity of the said assignment by way of mortgage or to hinder the plaintiff from having the benefit of the full amount thereof, and such proceedings were had in the equity suit, that a decretal order was made which is set out. And afterwards the defendant wrongfully, maliciously, &c., procured the sale of the said lands to be had, authorized under the said decree, &c., and afterwards at a public place exposed for sale at auction, &c., by means whereof the plaintiff was injured in his good name, &c., making his neighbors, &c., believe him to be poor, and that the Campbells had a right to obtain a decree, and that plaintiff was indebted to them, &c., and had neglected and refused or was unable to pay, and they on that account refused to deal with plaintiff, by which he is injured, &c.

A verdict having been given for the plaintiff for £3734 damages on the first count, and £590 on the second count, a rule *nisi* was obtained to set aside the verdict and enter a nonsuit or for a new trial on the following grounds. For nonsuit:—

1st. That there was no evidence of any proper deed of assignment having been tendered to the defendant.

2nd. No proof of tender of the money by the plaintiff.

3rd. That if there was proof of tender of a deed of assignment to the defendant it was not such a deed as he was bound to execute.

4th. That the conditions precedent on the part of the plaintiff not having been performed, the defendant was excused from the performance of his agreement.

5th. That the plaintiff did not insure the property as require by the fifth clause of the agreement.

6th. That no assignment could be made by the defendant un the time for payment had elapsed according to the agreement.

7th. No evidence of special damage or of malice on the part of defendant.

8th. That the Insurance Company were bound and entitled to an assignment of the mortgage.

9th. No evidence of the agreement, the secondary evidence having been improperly admitted for new trial.

For new trial:—

1st. Improper admission in evidence of the commission executed at Glasgow before three commissioners, it being directed to four.

2nd. Improper admission of conversation between the plaintiff and Bell, prior to the agreement.

3rd. Improper admission of the plaintiff's evidence as to his business and loss of credit, in consequence of the sale of his property under the decree in equity.

4th. Improper admission of the documents marked Nos. 65, 66, and 67.

5th. Improper admission of the Judge's order for the commission.

6th. Improper admission of Moore's evidence as to the plaintiff's credit, he having been only called to produce a paper.

7th. That the verdict on the first count was against evidence and the Judge's charge, and that the damages were excessive.

8th. That the verdict on the second count was against law, evidence, and the Judge's charge.

For misdirection, in stating:—

1st. That a plaintiff in a suit in equity could discontinue the suit and that it was the duty of the Campbells to do so under the agreement.

2nd. That the plaintiff was entitled upon payment to an assignment by defendant.

3rd. As to payment by the plaintiff.

4th. In leaving to the jury whether the payment of the £250 was made by Lingley on account of the plaintiff, and also in stating that the plaintiff's letter to Jack, of the 1st August, 1865, did not put an end to his interest.

5th. In stating that the letter and telegram from Mr. Wetmore to Jack did not authorize him to proceed with the equity suit and bind the plainfiff.

As regards the first objection on the motion to enter a nonsuit, we think the defendant had clearly put it out of his power to make a valid and effectual assignment, and therefore we cannot see that any tender of an assignment was necessary; but if it was we see no valid objection to the draft of deed tendered. The defendant did not object to the form or the covenants of the deed, but his refusal to execute it was because he had an agent in this country who was attending to his business, and when Bell, the agent, was spoken to by the plaintiff about it, he said they could not assign because the mortgage was gone by the equity sale.

As to the second point, a tender to the defendant both of the assignment and of the money was proved if the evidence taken under the commission was properly admitted, a question we shall consider hereafter.

Thirdly, that the deed of assignment tendered to the defendant was not such a deed as he was bound to execute. This is involved in the answer to the first objection.

Fourth and fifth objections. We think the jury properly found a substantial performance by the plaintiff of all that was necessary to enable him to maintain the action, both as respects the payment of the first instalment under the agreement, and the insurance on the property. Jack, as the agent of Campbells, received the £500 from the plaintiff, though after the day mentioned in the agreement, therefore the defendant cannot set up the non-payment on the day. So the agreement by the plaintiff to insure and assign the policy to Campbell was substantially performed by insuring in Campbell's name with the assent of Jack.

Sixth. The defendant having disabled himself by his own act from performing his contract, the plaintiff's right of action immediately attached. In Chitty on Contracts, (6 Ed. 799), it is said, "There are cases in which, although the contract appoints a future time for doing an act, the party who is to perform it may, even before the arrival of that time, subject himself to an action by *disabling* himself from fulfilling his contract; thus, where a party has disabled himself from making an estate which he has stipulated to convey at a future day by executing a conveyance inconsistent with that estate, he commits a breach of his stipulation and is liable to be sued before such day arrives." This is fully borne out by the cases of Bowell v. Parsons, (10 East 359); Loveloch v. Franklyn, (8 Q. B. 371); Hockster v. De La Tour, (2 E. & B. 678), and Avery v. Bowden, (5 E. & B. 714). In Inchbald v. Western Neilgherry, Coffee, Tea Chencova Company, (10 Jur. 1129), Earl, C. J., says, "Since the case of Planche

v. Colburn, (8 Bing. 14), it has always been held that wherever one of the parties to a special contract not under seal has disabled himself from performing his part of it by his own act, the other party may at once proceed to recover for the amount of work actually done." If one party to a contract disables himself from performing it, he dispenses with the performance by the other party of the conditions precedent to the act which he has so rendered himself unable to perform, Sands v. Parke. (8 C. B. 751). So where one party has derived some advantage from the other party having, to some extent, performed the contract in general, the agreement must stand, and the defendant must perform his part of it and seek compensation in damages for the plaintiff's default. Chitty Contracts, 815; Hill v. Cassonet, (4 M. & G. 903), Blackburn v. Smith, (2 Ex. 783).

Seventh. This objection is not applicable to the first count of the declaration, under which alone we think the plaintiff can recover.

Eighth. We cannot see what interest the Insurance Company have, or if they have any, how it can affect the plaintiff's right in an action for breach of this agreement.

Ninth. The prelimiary evidence of loss of the original agreement was for the learned Judge to determine, and he thinks there was sufficient evidence of the loss of the plaintiff's duplicate original, and that the defendant's duplicate original was in his own or his solicitor's possession, notice to produce which was duly given. We cannot say we differ from the learned Judge, more particularly as he offered to receive the evidence of Mr. Jack, the solicitor, or any other evidence the defendant might choose to offer to shew that the agreement was not in his, or his solicitor's possession, or to shew such facts as would prevent the reception of secondary evidence. This the defendant declined to offer.

On the points for new trial:

1st. The depositions objected to were taken in the manner pointed out by the order authorizing the issuing of the commission. The commission itself directs the depositions to be taken by four commissioners; one of the commissioners, though duly notified, did not attend, and the commission was executed by the other three. No suggestion has been made of the defendant having in the slightest degree suffered from the absence of the other commissioner, the examination was by written interrogatories and cross-interrogatories transmitted with the commission, and the witness was examined on all of them in presence of the defendant's solicitor, who attended and who does not appear to have offered any objection to, or protest against, the commission being executed by the three commissioners.

No application was made at Chambers or in Trinity Term to suppress the depositions on the ground of irregularity, and we think it was too late at trial for the first time to raise the objection. The defendant might and ought to have known the terms of the commission, and must be taken to have assented to the execution of it by the three commissioners, and to have waived the attendance of the fourth. Had the defendant's solicitor refused to attend the examination or had he objected to the three proceeding in it in the absence of the fourth, we will not say that on a proper application prior to the trial, the depositions might not have been suppressed. We rest our judgment on the ground that under the circumstances of this case, in addition to the waiver, the objection comes too late

2nd. The improper admission in evidence of the conversations of plaintiff and Bell, prior to the agreement. These were only received to shew the state of facts and position of the parties with reference to each other at the time the agreement was executed, and for such a purpose we think they were legitimately received.

3rd. The improper admission of evidence of injury done to the plaintiff's business and credit in consequence of the sale of his property under the decree in equity. We think he is not entitled to recover any damages on this account. They do not fairly and naturally arise from the breach of the contract.

4th. Improper admission of the documents marked respectively 65, 66, and 67. The first is a letter from the plaintiff to the defendant and his late partner, as follows:—

SHEDIAC, N. B., August 10th, 1866.

Messrs. J. & W. CAMPBELL,
Merchants, Glasgow.

SIRS,—Your favor of the 20th ult. is at hand and contents noted. I am instructed, for the purpose of saving the approaching Circuit Court for the county, it will be necessary to serve you, without loss of time, with papers, which my counsel will prepare, but which will not, in the meantime, prevent a settlement of my claim by you as stated in your letter you intended doing. The injury inflicted to me by the course you have taken is almost irreparable, but I need not add any further upon that subject except that I wish to avoid further delay and litigation. Enclosed you will please find a written statement made up by my attorney, Mr. Palmer, with his further opinion since the sale shewing the claim I have against you in consequence of the violation of your contract. You will observe I look to you only for reparation, as Mr. Jack, your attorney, although signing the agreement, has made himself no party to any of its provisions, and therefore not liable to me, but I must not suffer by the misconduct of your agents. I beg to acquaint you that Mr. Josiah Wood of Dorchester, in this Province, student at law in the office of Mr. Palmer, will visit Glasgow to see you about this business, who holds a power of attorney from me. He is instructed, in case he finds you as anxious to get rid of law and trouble as I am (without prejudice to my claim in case legal proceedings go on, and for the sole purpose of avoiding law and further trouble, and to try and secure something from the wreck and to endeavor to commence business again if possible) to offer to release you from all claims, and let

you keep all the property on payment to him of £4,554 14s 2d. sterling, which is the amount of liquidated damages only, thereby for the sake of settlement waiving all claim to any damages for the loss of credit, &c. Or in case you wish to give me the property purchased by you under the decree with an assignment of such decree, and an assignment of any judgment or debt or balance that you may have against Samuel Neil, and deliver the same to Mr. Wood for me, I would be willing to allow therefor £2,400 sterling, which may be deducted from the said sum of £4,554 14s. 2d., and upon payment of the balance, that is £2,154 14s. 2d. sterling in cash to Mr. Wood, my agent, he will release you. I have been induced to make this offer not because I will thereby be made whole, but from believing that you had nothing to do personally with these outrageous proceedings against me, and also from being much pleased with the frank tone of your letter, and thinking that a less sum might be more benefit to me now than a larger one got after wading through a lawsuit- I have given Mr. Wood instructions as above, and trusting that all cause of complaint will be removed as promised in your favor above referred to, I am

Your obedient servant,

WM. J. GILBERT.

P. S. I also annex to Mr Palmer's opinion enclosed, a copy of our agreement and one of the many advertisements circulated throughout the county by Mr. Jack.

W. J. GILBERT.

No. 66 is Mr. Palmer's opinion:

DORCHESTER, 8th August, 1866.

WILLIAM J. GILBERT, Esq.,

Dear Sir,—I am now in receipt of yours informing me that since my last to you on this subject, the Campbells, through their agent, in violation of their agreement, have proceeded with the suit against you and assessed against you the amount of both the mortgages to Crane, notwithstanding they had recovered a judgment against you for the notes for which these mortgages were given, and you had paid the judgment, and had also advertised all your property in the *Royal Gazette*, in this not only interfering with and preventing your doing your business, but also affecting your prospects for re-election for parliament for the County which you had represented for several years, and which election took place immediately thereafter. I hope Mr. Jack had not this in view when he took these strange and, in my view, illegal proceedings, but if not it is unfortunate for him that he should have taken such an active part in the election on the anti-confederate side and opposed to you, and that the property was bought by them at a sacrifice, no person bidding under the circumstances.

Your course is now plain. I will have a proper assignment of what they agreed to give you drawn out, and forward it by my clerk. Mr. Josiah Woods, to Glasgow, tender them the balance due and require them to execute it. They have now broken the agreement in almost every particular, and you have not and cannot get the assignment of mortgage from Neil of the two judgments against Neil. They, by proceeding in the suit, have taken from you the whole amount that you had paid them on the Crane mortgage, and you have lost and they have got all your real property for a nominal sum of £650. And last and not least you have lost your business and, I think, your election for parliament, by these proceedings. The damages are all liquidated except for the last, and I enclose a statement of them as taken from the papers. The case can be brought to trial in January in this County if pushed hard.

I am, &c.

A. L. PALMER.

No. 67, the statement above referred to, is as follows:—

Gilbert *v.* Campbell.

Statement of damages for breach of the agreement and interest to 1st September, 1868.

J. W. CAMPBELL,

To WILLIAM J. GILBERT, DR.

1860.		
Jan. 1—Debt secured by assignment of mortgage from Neil,.....		£1338 19 0
1866.		
Sept. 1—6 yrs. and 8 mos. interest at 6 per cent. N. Brunswick legal rate,		534 11 0
		£1873 10 0
1861.		
Mar. 1—Judgment.....	£684 0 9	
	5 11 0	
	£689 11 9	
1861.		
Sept. 1—5 yrs. 6 mos. interest.....	227 11 3	
	£917 8 0	
1863.		
August 2—Due paid for Insurance	72 0 0	
1866.		
Sept. 1—3 yrs. 4 mos. interest	14 17 9	
	£1003 10 9	
Costs of 1st Judgment.....	16 9 3	
	£1020 0 0	
Deduct 1-6 to bring into sterling.....	170 0 0	
	£850 0 0	850 0 0
	Sterling	£2723 10 0

Suit having proceeded in violation of the agreement, and Campbells got the amount of the face of the mortgage from Gilbert to Crane assessed, and sold the property to pay it, notwithstanding they had recovered judgment against Gilbert for the same claim and he had paid it as follows:

1865.		£2723 10 0
May 17th—Amount assessed by the Court under the two judgments.....	£436 10 0	
	298 5 6	
	£734 15 6	
1866.		
Sept 1—1 yr. 3½ mos. interest	56 17 6	
	£791 13 0	
Deduct 1-6 to reduce to sterling.....	131 18 10	
		£659 14 2
Carried forward.		£3383 4 2

Gilbert *v.* Campbell,

Brought forward,				£3383	4	2
Loss on property sold by Campbells in violation of the agreement and bought by them.						
Private residence	£1200	0	0			
Mill property and land in present state	1200	0	0			
	2400	0	0			
Sold for	650	0	0			
	£1750	0	0			
Deduct 1-6 to reduce to sterling	325	0	0			
	1425	0	0	1425	0	0
Sterling				£4808	4	2
Legal expenses, employment of counsel, &c				100	0	0
				£4908	4	2
Less unpaid under the agreement as near as can be computed				353	10	0
Net loss of Gilbert				£4554	14	2
Besides damages for the injury to Mr. Gilbert's business and credit in having his property advertized in the "Royal Gazette" for sale.						
Unliquidiated, say				£1200	0	0
				£5754	14	2

E. E. A. L. PALMER.

These papers were pressed in, in direct opposition to the opinion of the learned Judge, and we think them inadmissible. In Gilbert *v.* Palmer (1 Allen 667), the Court held that a party could not make evidence for himself by serving an account on the opposite party. In Fairlie *v.* Denton (3 C. & P. 103), where the plaintiff had written a letter to the defendant demanding a sum of money as due, and stating other matters, which letter the defendant had not answered, Lord Tenterden said, "What is said to a man before his face he is in some degree called on to contradict if he does not acquiesce in it, but the not answering a letter is quite different, and it is too much to say that a man, by omitting to answer a letter at all events, admits the truth of the statements that letter contains. You may have that single line read in which the plaintiff makes a demand of a certain amount but not any other part which states any supposed fact or facts." In Healy *v.* Thatcher (8 C. & P. 388,) where in action for an assault a letter was offered in evidence on the part of the plaintiff written by his attorney to the defendant, demanding an apology and stating that plaintiff was a person of the highest respectability, Gurnay B. refused to allow the letter to be read as not being evidence against the defendant, saying that the plaintiff was only entitled to read that part of the letter which asked an apology.

And again in Richards v. Franklin (9 C. & P. 221,) the same learned Judge says: "The plaintiff connot make evidence for himself by his attorney writing to the defendant, that can be done only for the purpose of showing either notice or a demand." If an unanswered letter contains any statement beyond what is necessary to explain the demand it will not be evidence against the party to whom it is sent. Gaskill v. Skene (14 Q. B. 664).—The learned Judge thinks the way these documents were used by the plaintiff's counsel in going to the jury might have, and in his opinion did, materially influence their minds, and, although the learned Judge endeavored to neutralize and prevent their having an improper effect, he cannot say that he thinks they had no effect prejudicial to the defendant The plaintiff's counsel must have considered them important and calculated largely to benefit the plaintiff's case, or we cannot suppose he would have jeopardised the result by forcing them in, in defiance of the Judge's opinion.

5th. The evidence of the order for the commission was wholly immaterial. We see no reason, however, why any paper in the cause may not be given in evidence.

6th. For the reasons stated in answer to the third objection on this head, the evidence of Moore as to the injury to the plaintiff's credit becomes immaterial.

As to the first ground of misdirection we think the learned Judge was right in directing the jury that Campbells had the power to discontinue the suit in equity and, were liable under this agreement for not doing so. The practice in equity upon the right of a plaintiff to move to dismiss his bill is very clear. It is said Daniell's Practice (3rd Ed. 632.) that a plaintiff may apply to the Court by motion to dismiss his own bill either as against all the defendants or against such of them as he thinks he can dispense with, with costs, and that he may do this as a matter of course, citing Dixon v. Parkes (1 Ves Jr. 402). Before the Statute of 4th Anne, c. 16, the plaintiff could dismiss his bill on payment of 20s. costs, though the defendant had answered, but that statute made him liable to pay the defendant's full costs. The right of a plaintiff to dismiss his bill on payment of costs is in general a matter of course at any time before decree In Curtis v. Lloyd, (4 M. & Cr. 194), Lord Cottenham said "that he could not see why a plaintiff should be in a worse situation because he informs the Court that he does not intend to proceed with the hearing of his cause than if he made default." After a decree the Court will not allow the plaintiff to dismiss his bill unless by consent, for all parties are interested in a decree, and any party may take steps to have the effect of it. Daniell's Prac. 635.

As to the second and third grounds we think the learned Judge was right, for the reasons already given in answer to the points for a nonsuit which involve the same questions.

4th. As to the alleged assignment by the plaintiff to Lingley, the plaintiff's letter to Jack of the 1st August, 1864, was only an authority to assign on full payment being made of the sums named in his agreement with Campbells. This never was done; Lingley only paid £250 to Jack, which sum the plaintiff swore Lingley afterwards charged to him, and the jury found that the payment was made to Lingley on account of Gilbert, and not on his own account, and Jack afterwards received from the plaintiff the balance of the first instalment under the agreement. Whatever, therefore, the right of Lingley, either legal or equitable, might have been if he had paid the whole amount due under the agreement, we think under the evidence the action was properly brought in the present case, and that the plaintiff is entitled to recover the full damages legitimately resulting from the breach of the agreement.

5th. As to the letter and telegram from Mr. Wetmore, neither the letter nor the telegram was acted upon by Mr. Jack. The plaintiff not only never assented to the suit in equity being proceeded with, but on all occasions appears in the most emphatic manner to have asserted his rights under the agreement, and he never, in our opinion, either by himself or his solicitor, did any act to release or relieve the defendant from its full and fair performance.

As we have determined that there must be a new trial on the ground of the improper admission of evidence, it is unnecessary to say any thing about the damages except those given upon the second count for the loss of the plaintiff's credit and business, which, we think, for the reasons already stated, cannot be recovered.

Rule absolute for a new trial.

DOE ex dem. ARMSTRONG v. BRIDGES.

APRIL 17th, 1869.

Where a party makes a representation to another, with reference to the title to lands, which induces him to alter his previous position and advance money upon them, he is estopped from denying the truth of such representation.

S. B. went into posession of a lot of Crown land in 1832, of which his brother, J. H. B., obtained a grant in 1834, the purchase money and cost of survey being paid by S. B., and J. H. B. never made an entry. S. B. died in 1852, devising it in lots to his sons, R., W. and T., who went into possession. T. mortgaged his share and sold the equity of redemption and his title became vested in plaintiff.

Held, That R. and W., having gone into possession under their father's will, were estopped from setting up a new title.

That as against the heirs of J. H. B., the Statute of Limitations did not begin to run until the grant issued.

Ejectment tried before Weldon, J., at the last Carleton Circuit. The *locus in quo* was granted by the Crown to John Holland Bridges, in 1834. Samuel Bridges, now deceased, the father of the defendants, lived on the land from 1831 and built a hut upon it; he afterwards removed to another lot but continued to cultivate this land until 1852, when he died. It appeared that John H. Bridges had obtained the grant for the benefit of Samuel, he being in insolvent circumstances, and that it was paid for by Samuel, who had the lot surveyed. By his will he left one hundred and fifty acres of this land to his son Robert, appointing him his executor, and seventy-five acres to each of his sons, William, the other defendant, and Thomas. The will was proved in the Probate Court by Robert, and each of the sons took possession of the land devised to him. Thomas, through whom plaintiffs claim, built a house on his portion, in which he was assisted by his brother Robert. In 1861 Thomas mortgaged his land to George Maddox, and it appeared from the evidence of Maddox that Robert at that time represented to him that their father had been twenty years in possession, and that Thomas had obtained his title to the land under his will, and that he acted on such representation. Maddox assigned the mortgage to the lessor of the plaintiff, who subsequently purchased the equity of redemption, Thomas Bridges having conveyed it to one Thompson.

The defendant, Robert Bridges, claimed the land under a verbal agreement alleged to have been made by him with J. H. Bridges in 1842 or 1843, who, he says, agreed to convey the land in payment for certain work done for him by Robert; and a quit-claim deed of this land, made in 1867, given to defendants by some of the heirs of J. H. Bridges, was also produced. There was no evidence of any entry having been made on the land by J. H. Bridges or his heirs, and no claim of ownership by them, with the exception of the quit-claim deed given to the defendant, Robert Bridges, by the heirs in 1867. The learned Judge told the jury that the Statute of Limitations would not commence to run against John Holland Bridges until a year after he got the grant, in 1834. The jury having found a verdict for defendants,

S. R. Thomson, Q. C., in Michaelmas Term, obtained a rule *nisi* for a new trial, on the grounds of misdirection, and that the verdict was against law and evidence; contending that the learned Judge

should have told the jury that Robert Bridges was estopped from denying his father's title; he having stated to Maddox that his father had been twenty years in possession of the land and thereby induced him to advance money upon it.

C. H. B. Fisher, shewed cause in Hilary term. The Judge's charge was right. Robert Bridges swears that he went into possession as purchaser from Holland Bridges, and the evidence of the statement made to Maddox being contradictory, it was a question for the jury and there is no estoppel. Robert Bridges went into possession under a title, and the possession of a part is possession of the whole. It was simple a question of evidence for the jury as to who was to be believed. Where two parties are in possession of property, and one claims by title and the other does not, on the death of the latter the former will take all. This was the case with Samuel and John H. Bridges. The fact of Robert going into possession, under title from John H., is conclusive. Samuel never was in actual possession of this seventy-five acres. [ALLEN, J.: I suppose you mean he never lived on it. RITCHIE, C. J.: If, as the learned Judge says, the lines were run out, his possession of a portion would be the possession of the whole.]

S. R. Thomson, Q. C., contra. It is clear the verdict in this case cannot stand. The declaration made to Maddox by Robert Bridges that the property was their father's, that it came to them by descent, as it induced Maddox to advance money on the land, is an estoppel in *pais* and prevents defendants now from denying their father's title, and the Judge should have so directed. They also took possession of the land under their father's will, and the story of Robert in regard to his having, in 1842, while a lad of eighteen, worked for and purchased the land on which his father then lived from J. H. Bridges is incredible. Even if true there never was any break in the title of Samuel, and the simple declaration of John Holland that he would give the land to Robert never could effect the title to the land.

RITCHIE, C. J., now delivered the judgment of the Court.

The land for which this action is brought was part of a tract of three hundred acres, granted by the Crown to John Holland Bridges in 1834. Samuel Bridges, a brother of John Holland Bridges, had been in possession of the land about two years before the grant issued, and made some improvements. After the grant issued, Samuel Bridges had the lines run round the land, and continued to occupy and cultivate it up to the time of his death, in 1852, without any interference by John Holland Bridges, who, it appeared, obtained

the grant for the benefit of Samuel, by whom the purchase-mone was paid. Samuel Bridges left a will, by which he devised, by pa ticular description and bounds, one hundred and fifty acres of th land to his son Robert, one of the defendants; seventy-five acres t his son William, the other defendant, and seventy-five acres to h son Thomas, and appointed his son Robert his executor. Robe proved the will in the Probate Court, and each of the sons too possession of the land so devised to him. Thomas built a house o the land devised to him, and was assisted in doing so by his brothe Robert, the defendant. In August, 1861, Thomas mortgaged th land devised to him to George Maddox, who assigned to the lessor c the plaintiff. Thomas afterwards conveyed his equity of redemptio to one Thompson. who gave a mortgage thereon, with a power c sale to Willard Sawyer, who sold and conveyed to the lessor of th plaintiff uuder the power. The lessor of the plaintiff, therefore, ha all the right and interest which Thomas Bridges had in the land.

The defendant, Robert, claimed the land under an alleged verb agreement with John Holland Bridges, in 1842 or 1843, who, it said, agreed to convey to Robert the whole of the land contained i the grant, as payment for work done for him by Robert. The d fendants also claimed under a quit-claim deed given to them by son of the heirs of John Holland Bridges in 1867.

As against the heirs of John Holland Bridges, we think the Statut of Limitations did not begin to run before the issuing of the gran The right of entry of John Holland Bridges did not accrue until h acquired the title to the land in 1834; and whether it accrued the or at the expiration of a year from the issuing of the grant, is n material in this case, as there is no evidence of any entry by Joh Holland Bridges. or his heirs, at any time, or at all events, not unt 1867, when the defendants, professing to claim as the assignees of th heirs, set up the quit-claim deed. This, however, taking the mo favorable view for the defendants, would be more than thirty yea after the right of John Holland Bridges accrued, and after Samu Bridges, and those claiming under him, had acquired a title by po session. Independently of any question under the Statute of Limit tions, we think the defendants are not in a position to set up titl under John Holland Bridges; that they were estopped by the entr under their father's will, from denying that the title was in hin There is no evidence of any disclaimer of title under the will, unles perhaps, a parol disclaimer; but that would be insufficient. A d visee is presumed to assent to a devise for his benefit, until he do some act to shew his dissent. Townsou v. Tickell, (3 B. & Ald. 31) Hamilton v. Love, (2 Kerr, 248). The acts of the defendants her so far from shewing a dissent from the devise, shewed an expre

assent to it, for they took possession of the land according to the division made by the will, recognizing the right of Thomas to that portion of the land now in dispute, which acts are entirely inconsistent with the alleged agreement by the defendant, Robert, to purchase the land from his uncle, John Holland Bridges, and with the claim of both defendants under the deed from the heirs of John Holland Bridges. In addition to this, we incline to think the defendants would be estopped from setting up title in John Holland Bridges, by their statement to Maddox, that their father had been in possession of the land for upwards of twenty years, and had left a will, devising the property to them and their brother. This statement is sworn to by Maddox, and is not positively denied by either of the defendants. Maddox acted upon the representation so made to him by the defendants, and by Thomas Bridges, in the presence of one or both of the defendants, and advanced his money on the security of Thomas' title under his father's will. The case, therefore, comes within the principle of Pickard *v.* Lewis, (6 A. & E. 474); Gregg *v.* Wells, (10 A. & E. 98); and Freeman *v.* Cook, (2 Exch. 661); Clark *v.* Hartt, (5 Jur. N. S. 447); Cairncross *v.* Lorimer, (3 Macq. H. L. cases, 827, 7 Jur. N. S. 149); that where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.

Rule absolute for a new trial.
Costs to abide the event.

DOHERTY *v.* DESBRISAY.

APRIL 24TH, 1869.

Where no notice of trial was given by plaintiff, and a counsel who had been retained for defendant in a former trial, in ignorance of this fact, appeared without authority, defendant being absent, and defended, a verdict for the plaintiff was set aside.

S. R. Thomson, Q. C., in Michaelmas Term last, moved on behalf of the defendant to set aside trial and all subsequent proceedings in this cause for irregularity. It appeared by affidavits that at the Westmorland Circuit, in July, 1867, the cause entered for trial and Mr. Smith retained as counsel for the defendant, but it was not then tried and the cause became a *remanet.* No notice of trial was given to the defendant's attorney for the next Westmorland Circuit,

but the cause was called on, and Mr. Smith being in Court and thinking the defendant and his witnesses were on their way to the Court, moved for a postponement, which being refused by the learned Judge the trial went on, Mr. Smith acting as counsel for defendant and the plaintiff obtained a verdict. Mr. Smith was not aware that no notice of trial had been given, and had no authority to act for defendant on the trial. A rule *nisi* having been granted,

A. L. Palmer, Q. C., shewed cause in Hilary Term, contending that Mr. Smith having been counsel in the first trial had authority to act on the second. [RITCHIE, C. J.: Did you not bring this difficulty on by not giving notice of trial? ALLEN, J.: Does the retainer of a counsel continue beyond the trial for which he is retained? RITCHIE, C. J.: The counsel here says that he acted without authority.] I had a perfect right to treat him as counsel for defendant, having been told by the attorney that he was so, and acting in good faith. *Prima facie*, if an attorney tells me that a certain person is his counsel I have a right to treat him as such, and the fact of there being no notice of trial given makes no difference if he appears and defends.

Fraser, contra. If notice of trial had been given, the appearance of Smith, either authorized or not, was not material, but here the plaintiff himself committed the first error, he not having given notice of trial. The fact of a counsel being retained in a cause gives him no power to waive notice of trial. Swinton *v.* Swinton, (5 Ex. N. S. 590) is quite conclusive on this point.

Cur. adv. vult.

ALLEN, J., now delivered the judgment of the Court.

The difficulty in this case arose from the plaintiff's attorney not having given notice of trial. The defendant and his attorney are blameless. When the cause was called on, Mr. Smith, who had been retained as counsel on a former trial, supposing that notice of trial had been given, and that the defendant was on his way to the Court, applied to the Judge to postpone the trial, and when the Judge refused to do so, and the trial proceeded, he acted as counsel for defendant, though, it appears by the affidavit, without any authority from the defendant. Had Mr. Smith not appeared, the verdict would have been set under with costs. As the matter now stands, we think the defendant ought not to be precluded, by the unauthorized act of Mr. Smith, from having an opportunity of defending the suit. The verdict will therefore be set aside, but, under the circumstances, without costs.

RANKIN *et al.* *v.* MITCHELL.

APRIL 24th, 1869.

S, who was building a ship for plaintiffs, being indebted to them, agreed to transfer the vessel to H, one of the plaintiffs, together with all materials for construction then procured, S to finish vessel at his own cost, and rig and equip her with rigging to be provided by plaintiff. The vessel, when finished, to be registered in the name of H. Canvas, cordage and wire were procured by L at plaintiff's store; and, while being prepared for the vessel, were taken by the sheriff under an execution against S, when $150 worth of labor had been expended upon them.

Held, That under the agreement the property in she sails and rigging remained in plaintiffs, and that the fact of the articles being charged to S in plaintiffs' books was not conclusive to shew a sale to S, but was a question for the jury.

That the plaintiff was entitled to recover the value of the sails and rigging when taken.

Trespass against the sheriff of Northumberland for unlawfully taking a quantity of sails and rigging tried before ALLEN, J., at the last Northumberland Circuit. The defendant justified the taking under an execution against one Sinclair, and the question was whether by the terms of a certain agreement the property taken belonged to Sinclair or the plaintiffs. The facts of the case are fully set forth in the judgment of the Court. A verdict having been found for plaintiff, Needham, in Michaelmas Term last, obtained a rule *nisi* for a new trial on the grounds of misdirection and excessive damages.

A. L. Palmer, Q. C., shewed cause in Hilary Term. The only property that passed to Hutchison by this agreement was the wood and iron of which the vessel was composed. The object of the agreement was to divest the property from Sinclair, but the sails and rigging never passed out of the plaintiffs. The goods taken by the sheriff were never sold to Sinclair by the plaintiffs, for by doing so they would have defeated their own agreement by which they agreed to furnish the sails and rigging for the vessel. The fact of them being charged to Sinclair does not shew that they passed to him. [WELDON, J.: Suppose they had been burnt in the sail loft whose loss would it have been?] I should say the plaintiffs, for they were not making a sale but carrying out their agreement to supply certain articles. [ALLEN, J.: I thought at the trial that Sinclair did not go to buy the articles as a man would go to purchase in the ordinary way.] It cannot be contended, as was done by defendants, that the goods belonged to Hutchison, for that could only arise on their becoming a part of the vessel, which they never did; and the property being originally the plaintiffs, it is for defendants to shew that it passed from them. The damages were certainly not excessive, for the plaintiffs only recovered the value of the goods at the time they were taken.

Needham, contra. If the ship had been finished by Sinclair, an she had gone to sea with that rigging, and the sails had been los would it not have been the loss of Sinclair, and if that is so, how ca the sails and rigging be plaintiffs' property? [ALLEN, J.: The agree ment provides for that. If your contention is correct, the hull of th ship would have belonged to Hutchison, and the sails and rigging t Sinclair.] I read the agreement differently. All the agreement gav was the hull of the vessel and the articles intended for the vesse which had been already procured. There is an absolute gift of th ship to Hutchison, and the only trust is with reference to the balanc of the money after the sale. The word sails is not mentioned in th agreement, and the word rigging cannot be taken to include them, s that the moment the sails were delivered to Sinclair, they becam his property, and the plaintiffs had no further claim on them.

The damages were excessive. The plaintiff actually received th value of the labor which had been expended in making the sails a the time they were seized, some $150, so that the verdict should a least be reduced that amount.

Cur. adv. vult.

ALLEN, J., now delivered the judgment of the Court.

This was an action of trespass against the sheriff of Northumber land, for taking a quantity of sails and rigging in the course of pre paration for a ship. The defendant justified the taking under a execution against one Edward Sinclair, and the question is, whethe the property taken belonged to him or the plaintiff.

It appears that Sinclair was building, and had partly finished, vessel, and being indebted to the plaintiffs, entered into an engage ment with them, in December, 1867, by which he agreed to sell an transfer to R. Hutchison, one of the plaintiffs, the vessel and all th timber and materials then prepared or procured, and intended to b used in her construction; that he would finish the vessel at his ow cost, and launch her, not later than the 1st May then next, and tak her to the plaintiffs' wharf in Douglastown, and there, "with riggin to be provided by the plaintiffs, rig and equip the vessel in ever respect, and make her ready for sea with all despatch." That h would furnish Hutchison with a builder's certificate, or the necessar documents to enable him to have the vessel registered in his ow name; that the vessel should be loaded by the plaintiff and sent to suc port as Hutchison should think proper, and sold, and that after de ducting all necessary expenses and disbursements, and all claims tha the plaintiffs or Hutchison might have against the vessel, or agains Sinclair, any balance that might remain was to be paid to Sinclair.

Before the vessel was launched, Sinclair went to the plaintiffs' store and selected canvass, cordage and wire rigging for the sails and rigging of the vessel, and took them to a sailmaker and rigger, employed by him, to make and fit them for the vessel. They were charged by the plaintiffs to Sinclair, in his account. While they were in the hands of the sailmaker and rigger, and before they were all completed, they were seized by the sheriff, under an execution against Sinclair. The value of the labor put upon them was £37 10s., a part of which had been paid by Sinclair.

The learned Judge left the question to the jury whether there was any sale of the canvass and rigging by the plaintiffs to Sinclair, stating his opinion that, under the agreement, there was no intention to pass the property. He directed them that the word "rigging," taken in connection with the words immediately following in the agreement, included the sails as well as the wire and cordage; and that they remained the property of the plaintiffs until they were put upon the vessel. If they found a verdict for the plaintiffs, to give the value of the sails and rigging at the time they were taken by the defendant. The jury found for the plaintiffs accordingly.

We think this direction was correct, and that the evidence fully warrants the verdict. It never was the intention of the parties to the agreement that the sails and rigging should become the property of Sinclair; and as the plaintiffs were to account to him for the proceeds of the sale of the vessel, after deducting all expenses and disbursements, their charging the canvass and rigging to him, though a fact for the consideration of the jury, and so left to them, was not conclusive to shew a sale to Sinclair. We think, also, that the construction put upon the agreement was correct. The whole of the agreement must be considered, in order to ascertain the intention of the parties. Though the word "rigging," standing by itself, probably would not include sails, but would mean only the standing and running rigging, the subsequent part of the sentence shews that the parites did not intend so to limit it. Sinclair was to "rig *and equip* the vessel *in every respect*, and make her ready for sea," and he was to do this with "rigging" to be furnished by the plaintiffs. He was to do all that was necessary to make her ready to sail on a voyage. He could not do this without putting sails upon her, and all the materials that were necessary, so to equip her, were to be furnished by the plaintiffs. Then, if the sails and rigging were once the property of the plaintiffs, when and how did they cease to be so? Clearly they would not until they were put upon and formed a part of the vessel, when, under the agreement, they would have become Hutchison's property. As they were never put upon the vessel, there was no change of property.

We think, also, there was no misdirection as to the damages. The defendant was a wrong doer, and is liable for the full value of the goods. Where the plaintiff has the immediate right to the possession of goods, the proper measure of damages, as a general rule, is the full value of them at the time of the conversion by the defendant. Edmondson *v.* Nuttell, (17 C. B., N. S. 280), Swire *v.* Leach, (18 C. B., N. S. 479). Whatever claims Sinclair may have against the plaintiffs, for the value of any labor which he, or persons employed by him, may have put upon the goods, is a matter with which the defendant has nothing to do.

Rule discharged.*

OULTON *v.* SCOVIL.

APRIL 24TH, 1869.

An application was made on behalf of B. to compel the sheriff to pay over a sum of money deposited by him in lieu of bail in certain suits in which S. was arrested, but in which he had since been rendered. B.'s affidavit set forth that the sheriff agreed, when the money was deposited, to return it if S. was rendered. This statement sheriff denied, alleging that he gave a receipt to B., and that the creditors of S., who were proceeding against him, under Absconding Debtors' Act, claimed the money as the property of S.

Held, That the receipt not being produced, and the evidence and claims being conflicting, the Court would not grant the application.

A. R. Wetmore, Attorney-General, in Hilary Term last, applied on behalf of W. B. Robinson, for an order to compel James A. Harding, sheriff of St. John, to pay over the sum of $3,225, deposited by Robinson with the sheriff, in lieu of bail for Samuel J. Scovil, in several suits in which he had been arrested. Robinson's affidavit states that when the money was deposited with the sheriff, it was distinctly agreed that if Scovil should be rendered in discharge of his bail, the money should be returned to him by the sheriff, and that Scovil had been so rendered in discharge of his bail, in the suits for which the money was so deposited. A rule *nisi* having been granted,

Palmer, Q. C., with him *Crawford*, shewed cause, reading the affidavit of the sheriff, which denied that the money was received on the terms stated by Robinson; that at the time he received the money he gave him a written receipt for it; that he claimed to hold it as an indemnity against loss in consequence of the arrests of Scovil, and that since his arrest proceedings had been taken against Scovil,

* Ritchie, C. J., took no part in this case.

as an absconding debtor, and a claim made on behalf of the creditors upon him for the money which was claimed to be the property of Scovil. The Court has no power to try the right to the money in a proceeding of this kind, and cannot compel the sheriff to pay over the money.

Wetmore, Attorney General, contra. The sheriff is an officer of the Court, and the Court has a common law jurisdiction over him. Here the sheriff is acting illegally with the process of this Court, and is entitled to pay the money back. If he was entitled to receive the money, the Court should order him to pay it back on receiving a guarantee with reference to bail; and if he had no power to receive it the Court will compel him to pay it back, because it would be unjust for him to retain it. It has been contended that the sheriff holds this to indemnify himself against previous suits. But he does not shew that special bail has not been given in these suits, nor that there is a shadow of responsibility for any suit. Besides he has no right to indemify himself against other suits; and as far as this suit is concerned, the sheriff has been indemnified, for the party has been rendered to the custody of the sheriff of King's. The money should be paid back to Robinson, or if not, it should be paid into the Court.

Cur. adv. vult.

ALLEN, J., now delivered the judgment of the Court.

This was an application on behalf of Wm. B. Robinson, requiring the sheriff of St. John to shew cause why he should not pay over to Robinson the sum of $3,225 deposited by him with the sheriff, in lieu of bail, as is alleged, for Samuel J. Scovil, in several suits in which he had been arrested, and in which he had since been rendered in discharge of his bail. Robinson's affidavit states that on the money being deposited it was distinctly agreed and understood between him and the sheriff that if, on application, it should be decided that the arrests were improper, by reason of Scovil being privileged from arrest, or if Scovil should be rendered in discharge of his bail, the money should be returned by the sheriff.

The affidavit of the sheriff denies that he received the money on these terms, and he claims to hold it as an indemnity against any loss which he might sustain or be put to in consequence of the arrests of Scovil. It appears, also, that when he received the money he gave Mr. Robinson a written acknowledgment for it. Since that, also, proceedings have been taken against Scovil as an absconding debtor, and a claim has been made upon the sheriff, on behalf of the creditors, for the money, as being the property of Scovil, and no steps appear to have been takeu to try the right to it, under the Act.

In view of these conflicting statements, and particularly in the absence of the receipt given by the sheriff at the time he received the money, which would probably shew the terms on which he received it, and which receipt the applicant ought to have produced, and also in view of the claim made to the money, on behalf of the creditors of Scovil, we think we are not called upon to interfere in this summary application. In the language of Dallas, C. J., in Elderston *v.* Adams, (8 Taunt. 558), a case very analogous to this, we think "we cannot go into a collateral trial of the conflicting interests of the different parties." The rule will therefore be discharged.

Rule discharged.

McMillan *v.* Fairly, *et al.*

April 24th, 1869.

In trespass against several defendants, the plaintiff had forbidden them from going on his land, and again, after acts of trespass had been committed, notified them to desist, whereupon two of them did so. At the trial, plaintiff elected to proceed against all the defendants, and, under the Judge's direction, only recovered for the trespass committed before the two defendants left, amounting to $2. Held, That plaintiff was entitled to the certificate of the Judge; that the trespass was "wilful and malicious."

Wetmore, Attorney General, on a former day, in this term, was heard in support of an application to Allen, J., who tried the cause, for a certificate that the trespass was wilful and malicious, in order to entitle the plaintiff to costs, under 8 and 9 William III., cap. 11. The action was trespass for injury to plaintiff's intervale by hauling logs off it, which had been carried there by the freshet. The plaintiff had forbidden the defendants from going on his land, and after they had been hauling logs part of a day, in July, he again forbade them hauling any more until the grass was cut, threatening to proceed against them if they persisted. Two of the defendants, Hunter and Pond, upon this notice, left the land and interfered no further, but the other defendants continued hauling until the logs were removed. At the close of the evidence, the plaintiff's counsel elected to proceed against all the defendants, whereupon the learned Judge directed the jury that the plaintiff could only recover for the damage done before Hunter and Pond left. Verdict for plaintiff $2.

A. L. Palmer, Q. C., contra, contended that the case stood as if it had been brought against Hunter and Pond alone, and that being the case, it was a matter which might and ought to have been recovered in a Magistrate's Court, and the plaintiff was not entitled to a Judge's certificate.

Cur. adv. vult.

ALLEN, J.—This was an application made to me for a certificate that the trespass in this case was wilful and malicious, in order to entitle the plaintiff to costs, under the Statute 8 and 9 William III, cap. 11. The application was made immediately after the trial, and I should have granted the certificate if the attorney had appeared before me on the summons at an earlier day.

The tresspass was committed after the defendants were forbidden by Dudley to go on the plaintiff's land, notwithstanding which, they went on and hauled the logs, and therefore committed a wilful trespass. It was after they had gone upon the land and commenced hauling, that the plaintiff himself spoke to them and told them that if they would not haul any more logs off his land he would not prosecute them; and though two of the defendants committed no further trespass after this, the others continued on the land, and, no doubt, did the principal part of the injury. For this the plaintiff has recovered no damages, for the reasons stated in the judgment of the Court on the motion for a new trial.

I have no doubt (and the other members of the Court agree with me)* that the plaintiff is entitled to a certificate in this case, under the authorities of Good v. Watkins, (3 East, 495); Wooley v. Whitby, (2 B. C. 580); Sherwin v. Swindall, (12 M. & W. 784). The certificate will therefore be granted.

DOE ex dem. TRIDER v. MCINTOSH.

An affidavit made by an attorney, that the lessor of the plaintiff resided in Halifax, N. S., had never been in this Province, had not the deed in his possession, and did not know where it was to be found, is not sufficient to entitle a certified copy of the deed to be given in evidence under 1 Rev. Stat., cap. 112, § 12. Fisher, J., *dissentiente*.

Where no proof was given that the deed was ever in defendant's possession, and no notice to produce to defendant, secondary evidence by a certified copy is inadmissable.

Ejectment tried before ALLEN, J.: at the last Gloucester Circuit. For the purpose of proving title, the plaintiff, under 1 Rev. Stat., cap. 112, § 12, offered in evidence a certified copy of a deed from the sheriff to the lessor of the plaintiff. The affidavit attached on which the plaintiff claimed that the copy of the deed should be admitted in evidence, was made by the attorney in the suit, and stated "that the lessor of the plaintiff resides in Halifax, in Nova Scotia, and that he has never, according to the best of this deponent's knowledge

*Fisher, J., took no part.

or belief, been in this province, and deponent further saith that the original deed, of which the annexed instrument marked A. purports to be a certified copy from the records of the County of Gloucester, is not in the possession, power or control of the said lessor of the plaintiff, and that the said lessor of the plaintiff, Wm. Trider, does not know where the same is or may be found." The defendant's counsel objected to the admission of the copy of the deed on the ground that the affidavit was not sufficient, and the learned Judge took that view of the case, but it was finally received in evidence by consent subject to the objection. The attorney went on the stand to prove that up to the time of its loss the deed had always been in his possession and never in the possession of the lessor of the plaintiff, and that he had last seen it in the Court House on a former trial. No sufficient notice to produce the deed had been given to the defendants. A verdict having been found for the plaintiff,

Needham, in Michaelmas Term last, obtained a rule *nisi* for a new trial, on the grounds, 1st, that the affidavit attached to the copy of the sheriff's deed was not sufficient to admit it as a certified copy of the registry under 1 Rev. Stat., cap. 112, § 12. That there was not sufficient evidence of the loss to entitle the copy to be admitted as scondary evidence independently of the statute.

A. L. Palmer, Q. C., shewed cause in Hilary Term. The point taken was that the affidavit of the loss of the deed should have been made by the lessor of the plaintiff and not by the attorney. I contend that the latter having the custody of the deed, was quite competent to make affidavit, and that the words of the statute have been complied with. [RITCHIE, C. J.: How could the attorney in Bathurst, on a certain day, swear that Trider, in Halifax, did not know a matter which it was competent for him to know; can this affidavit be taken for more than a statement of the attorney's knowledge and belief?] I contend that on its face it is sufficient. Even without reference to this act, we would be entitled to give the certified copy in evidence as secondary evidence.

Needham, contra. It cannot be contended that any person is competent to make this affidavit, or a party might be brought to swear that Trider had not the deed, while he had it in his possession. It never could have been the intention of the Legislature that secondary evidence should be admitted on such flimsy proof of loss. The intention of the law giving fourteen day's notice to the opposite party was to enable him to go to the records and see if the copy of the deed was correct. By the 13th section it will be seen that no certified copy can be admitted, unless all the requisites have been

complied with, which in this case has not been done. Even if the evidence given at the trial by the attorney had been embodied in his affidavit, it would not have entitled the copy of the deed to be admitted.

Cur. adv. vult.

FISHER, J., differing from the rest of the Court, the judgment of the majority* was delivered by

ALLEN, J.—The questions in this case are, 1st, whether the affidavit attached to the copy of the sheriff's deed to the lessor of the plaintiff was sufficient to admit it in evidence as a certified copy of the registry, under the Rev. Stat., cap. 112, § 12; and if not, 2nd, whether there was sufficient evidence to admit the copy as secondary evidence, independent of the statute.

The affidavit on which the plaintiff claimed that the copy of the deed was admissible under the Act, was that of the attorney in the suit, and stated as follows:—"That the lessor of the plaintiff resides in Halifax, in Nova Scotia, and that he has never, according to the best of this deponent's knowledge and belief, been in this Province, and deponent further saith, that the original deed, of which the annexed instrument marked 'A' purports to be a certified copy from the records of the County of Gloucester, is not in the possession, power or control of the said lessor of the plaintiff, and that the said lessor of the plaintiff, William Trider, does not know where the same is or may be found."

The learned Judge thought at the trial that the affidavit was not sufficient to admit the copy of the deed in evidence, but received it by consent of the defendant's counsel, subject to the objection. The Act declares that before any such copy shall be received, "it shall appear to the Court by affidavit, that such original conveyance is not under the control of the party, and that he does not know where the same may be found." It may be that the affidavit in this case is a compliance with the *letter* of the statute; but we cannot see how a person in this Province could swear to the knowledge of another person in Halifax respecting a certain fact, at least without stating reasons to shew the means of knowledge of the person making the affidavit. We will not say that the affidavit can only be made by the party on whose behalf the copy of the deed is offered in evidence; but if it can be, and is made by a third party, it ought to state his means of knowledge, in order that the Court may judge of their sufficiency. The admission in evidence of certified copies of deeds, is an innovation on the principles of the common law, and therefore

*Ritchie, C. J., Allen, J., and Weldon, J.

ought not to be extended further than the case absolutely requires. Though it may be very convenient in many cases to allow evidence of this kind, the admission of it may be open to great abuse, and therefore we must take care, that in construing the Act, we do not go beyond the intention of the Legislature.

2nd. As to the admission of the copy of the deed as secondary evidence. At common law, a certified copy a deed is not evidence, either primary or secondary, and to make it evidence, the provisions of the statute must be complied with. This was not done in the present case, for it was neither proved that the original deed was in the possession of the defendant, nor that notice had been given to him to produce it, as required by the 13th section of the Act. On both grounds, therefore, we think the rule for a new trial must be made absolute.

Rule absolute.

FISHER, J.—I regret that I am unable to agree with the rest of the Court upon the main question in this case, the admissibility of the certified copy of the sheriff's deed. The plaintiff offered in evidence a copy of the sheriff's deed from the records of the County of Gloucester, duly certified by the Registrar of Deeds of that County, with an affidavit of the attorney of the lessor of the plaintiff, stating that the lessor of the plaintiff resides in Halifax, Nova Scotia, and that he had never, according to the best of deponent's knowledge and belief, been in this Province; and deponent further saith that the original deed, of which the annexed instrument marked 'A' purports to be a certified copy from the records of the County of Gloucester, is not in the possession, power or control of the lessor of the plaintiff; and that the said lessor of the plaintiff did not know where the same is or may be found.

The 12th section of chapter 112 of the Revised Statutes enacts, in substance, that a party desirous of giving in evidence in any suit a conveyance which may have been duly registered and relevant to the matter in question, may produce in evidence a copy of the registry of such conveyance certified by the Registrar, which copy shall, in the absence of the original conveyance, be received and allowed as evidence of the contents thereof, but before any such copy shall be received it shall appear to the Court that such original conveyance is not under the control of the party, and that he does not know where the same may be found, and at least fourteen days notice shall be given to the adverse party of the intention to offer the same, such notice to be accompanied with a copy of the certified copy and a copy of the affidavit.

The first question that presents itself to my mind under the statute

is, can the affidavit be made by any other person than the plaintiff? It would be limiting the effect of the statute too much and largely defeat the object of its enactment to determine that any other person than the plaintiff could not make the affidavit. Assuming that the attorney or agent of either party in the suit can make the affidavit, I imagine many cases, when from the residence of the party or other peculiar circumstances, an attorney or agent may with safety swear as positively as the attorney in this case has.

If the plaintiff had made the affidavit in the form prescribed by the statute, the certified copy of the deed could have been received as evidence without further inquiry as to the knowledge of the fact to which he deposed. In this case the attorney has made the affidavit, and as he has sworn positively to all the facts required to be stated, in my opinion there is such a substantial compliance with the terms of the Act, as to entitle the plaintiff to have the certified copy received as *prima facie* evidence of the contents of the deed.

The statute appears to me to have provided for just such a case as this by requiring that the defendant shall be furnished with the copy of the certified copy and of the affidavit upon which it is intended to be offered in evidence fourteen clear days before the trial, so that if the fact stated in the plaintiff's affidavit, upon which he relies as a ground for offering the certified copy in evidence, can be contradicted or impugned in any way he will have full opportunity of doing so.

If the defendant had shewn that a state of facts existed inconsistent with the statement made in the affidavit of the attorney, or had impugned the affidavit in any way, or had cast any reasonable suspicion upon the deed as registered in the office of the Registry of Deeds for Gloucester, then in any of these cases the Judge might have either refused it, or, having admitted it, struck it out of the minutes of the evidence in this case.

As no such evidence was offered and no suspicion cast upon the deed which had been registered after the preliminary proof required by law, I am of opinion that the certified copy as offered should have been received as evidence of the contents of the original deed.

With regard to the other question, I have no doubt whatever that if the certified copy could not be admitted under the twelfth section of the Act it could not be received as secondary evidence.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NEW BRUNSWICK,

IN TRINITY TERM,

IN THE THIRTY-SECOND YEAR OF THE REIGN OF QUEEN VICTORIA.

McKENZIE, Curator of the Westmorland Bank, *v.* WISWEL.

11th JUNE, 1869.

The stockholders of the Westmorland Bank, by their charter, in addition to the liability of the stock held by them for payment of the debts of the bank, are liable in their private and individual capacity for an amount equal to the amount of their stock.

Where the notices and orders upon which an action under the Winding-up Act was founded, were entitled "The President, Directors and Company of the Westmorland Bank, in the County of Westmorland," the corporate name being "The President, Directors and Company of the Westmorland Bank." Held, No misdescription, the words being merely an addition to the locality.

This was an action brought by the Curator of the Westmorland Bank, under the Winding-up Act, for the amount of an assessment on certain stock held by the defendants; tried before WELDON, J., at the last Westmorland Circuit. Two objections were taken at the trial on the part of defendant. 1. That the notices and orders on which the action was founded, were improperly admitted as evidence, because they were wrongly entitled by reason of a misdescription in the name of the Corporation, it being described in the notices as "The President, Directors and Company of the Westmorland Bank of New Brunswick, in the County of Westmorland," instead of "The President, Directors and Company of the Westmorland Bank," which was the proper corporate name. 2. That the words of the bank charter, 11 Vic., cap. 1, did not create a double liability on the

part of the stockholders, and that they were only liable to the extent of the loss of their stock. A verdict being found for plaintiff,

S. R. Thomson, Q. C., in Hilary Term last, obtained a rule *nisi* for a new trial, on the above grounds.

A. L. Palmer, Q. C., shewed cause in Easter Term. 1. In regard to the notices and orders not being properly entitled, the description in them by the addition of the words "in the County of Westmorland," was only for greater certainty and cannot affect them. It is admitted that the description "The President, Directors and Company of the Westmorland Bank of New Brunswick," would be right, and the addition of the other words being only a matter of description cannot have misled the defendants, and the notices are good. 2. It is clear from the words of the bank charter, that a double liability is intended. The words are that no one stockholder shall be "liable to pay a sum exceeding the amount of stock then actually held by him." All the bank charters in New Brunswick are alike, and the meaning of the words is too clear to be misunderstood.

S. R. Thomson, Q. C., contra. I contend that the words of the Act do not give a double liability; that the words mean if the company goes into operation with only a partial capital they shall be liable to pay up to the full extent of their capital. [RITCHIE, C. J.: The words cannot be given an intelligible meaning unless a double liability is meant.]

As to the other point, the power given to the curator is purely of a statutory character; he must pursue his authority strictly, and it must appear on the face of the proceedings that he has done so. Rex *v.* Croke, C. 1 Cowp. 26). The words "in the County of Westmorland" are no part of the corporate name, and there is, therefore, a misdescription of the notices which renders them inadmissible.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

Only two questions were raised in this case, one as to the double liability of the stockholders in the Bank of Westmorland, and the other as to the description of the bank in the notices, &c., amounting to a misnomer. The words of Sect. 19 of 17 Vict., cap. 1, under which the bank is incorporated, are, "the holders of the stock of the said bank shall be chargeable in their private and individual capacities, and shall be holden for the payment and redemption of all bills which may have been issued by the said corporation, and also for the payment of all debts at any time due from the said corporation in proportion to the stock they respectively hold, provided, however,

that in no case shall any one stockholder be liable to pay a sum exceeding the amount of stock then actually held by him, provided, nevertheless, that nothing previously contained shall be construed to exempt the joint stock of the corporation from being also liable for, and chargeable with, the debts and engagements of the same." By Sect. 2, the capital stock of the corporation, it was declared, should consist of current gold and silver coin to the amount of £15,000, half thereof to be paid in one year and half within two years from the passing of the Act, the stock to be divided into shares of £25 each, making six hundred shares. It is abundantly clear that the liability imposed by the 19th section on the holders of stock in their private and individual capacity is in addition to the liability of stock for payment of all debts, and if there should be any doubt on this question from the wording of the first part of the section, which we think there is not, the proviso unquestionably removes it. The first part of the section makes the holders of stock chargeable in their private and individual capacity for the payment and redemption of all bills issued by them, and debts due from the corporation in proportion to the stock they hold. Nothing can be clearer, from these words, than the unlimited proportionable liability of the stockholders, that is to say, if a stockholder held a fifth of the stock he would be liable for a fifth of the bills and debts. But the proviso follows, and limits his liability to pay to a sum not exceeding the amount of stock actually then held by him, that is to say, if he held stock to the amount of £100, no matter how much the bank might be indebted, he could only be called on to pay, in addition to his stock, £100; and then, as if to sweep away the possibility of a doubt as to this liability being in addition to the stock, it is provided, nevertheless, that nothing previously contained shall be construed to exempt the joint stock of the said corporation from being also liable for, and chargeable with, the debts and engagements of the same.

As to the corporation not being properly described in the notice, there is nothing in this objection. The corporate name is "The President, Directors and Company of the Westmorland Bank," the name is thus used in the notice, with the addition of the words "in the County of Westmorland." These words were used to state merely an addition of the locality of the bank, and are the very words used by the legislature itself in the title of the Act, and in the preamble for the same purpose, and the 25th section actually requires the bank to be kept and established in the County of Westmorland. The cases of Mayor v. Burgess, of Lynn, (10 Coke, 123), Croydon Hospital v. Fairlay (6 Taunt. 468), Forbes v. Marshall (32 L. & E. 589), shew that it is sufficient if the name be substantially the same.

In re PRESIDENT, &c., WESTMORLAND BANK—*Ex parte* ALLISON.

EQUITY APPEAL.

JUNE 11, 1869.

The executors of the estate of C invested a portion of its funds in bank stock in their own names, but for the benefit of the estate, by which the dividends were received. After their death their representatives, by writing, agreed to transfer the stock to the widow of C, who had taken out letters of administration *cum testamento annexo de bonis non.* The stock certificates were handed over to her and she afterwards received the dividends, but no transfer was made on the books of the bank as required by its charter and by-laws. The bank suspended, and the estates of the executor were placed by the Judge on the list of contributories for the stock standing in their names on the register.

Held, That they being *prima facie* legally liable the Judge was right in not altering the register by substituting the party equitably entitled to the stock.

This was an appeal from an order of WELDON, J., whereby he declared the estates of C. F. Allison and Joseph F. Allison, to be contributories in respect of one hundred and thirty-six shares of the stock of the Westmorland Bank standing in the books of the bank, in their joint names, and the estate of J. F. Allison in respect of four shares standing in his individual name. The facts are as follows:—

The Hon. Wm. Crane died in 1853, leaving Charles F. and Joseph Allison his executors. Charles F. Allison died in 1858, appointing Joseph and Henry B. Allison his executors, and in May, 1863, Joseph, the surviving executor of Crane, also died, and by his will appointed Mary Allison and Henry B. Allison his executrix and executor; the former has since married Hon. A. E. Botsford. In 1863, Eliza Crane, the widow of William Crane, took out letters of administration *cum testamento annexo de bonis non,* appointing H. B. Allison her agent for the collection of the debts of the estate. In 1854, by 17 Vict., cap. 1, the Westmorland Bank was established, and in that and the four following years, Charles F. and Joseph Allison, as executors of Crane, and for his estate, invested the money of the estate in their own names in one hundred and thirty-six shares of $100 each, of the stock of the said bank, and in 1860 Joseph Allison invested in his own name four shares of the said stock. These stocks were purchased with the funds of the Crane estate, part being purchased at a premium and entered in the books of the bank for that estate, as representing £3,576 9s. 5d. The bank up to the time of its suspension had been in good credit, paying dividends at the rate of seven per cent., which were received by Charles F. and Joseph Allison in their life-time, and entered in the books of the Crane estate for its benefit. These books were continued by Eliza Crane, and contained the account of the bank stock dividends received by H. B. Allison, as her agent, until the agreement of September 11th, 1866, by which

H. B. Allison, and the other executors and heirs of Joseph and C. F. Allison, agreed to hand over to Eliza Crane all the cash and bank stock belonging to the Crane estate under their control, on or before the 15th of September then next, and to execute all the necessary documents for the purpose of transferring the same. On the 28th September, Eliza Crane gave a receipt for certain books, and scrip shares and debentures, with seven certificates of the Westmorland Bank, representing £3,576 9s. 5d. No transfer of the stock took place on the books of the bank, in consequence of the absence of the president in England, whose presence was supposed to be necessary to complete the transfer. On 24th January, 1867, Mrs. Crane's solicitor drew an order, which was signed by H. B. Allison, requiring the Westmorland Bank to pay the amount of the dividend on £3,500 stock, standing in the names of the executors of the Crane estate then due, at the Bank of New Brunswick, St. John, to the account of Mrs. Crane. The dividend was paid and received accordingly by Mrs. Crane, as the holder of the stock for the Crane estate. In March, 1867, the Westmorland Bank suspended, and on application an order was made on the 14th May, under 27 Vict., cap 44, a curator appointed and a call made under § 19 of the Act of Incorporation, and the name of H. B. Allison was put down in the list of stockholders as representing one hundred and forty shares, but on a subsequent hearing before Weldon, J., to settle who were contributories, on it being urged by counsel on his behalf that he was merely an agent, his name being neither on the list of stockholders, the certificates, nor on the books of the bank as representing these shares, the learned Judge ordered his name to be removed from the list, and declared the estates of C. F. and Joseph Allison, stockholders to the extent of one hundred and thirty-six shares, and the estate of Joseph Allison for four shares, and liable to be placed on the list of contributories.

C. W. Weldon for appellants. The bank stock is the property of the Crane estate, and was purchased by J. F. Allison, with the funds of the Crane estate and for its benefit, and the bank was aware of this fact, as is shewn by their books. By the agreement of 11th September, 1866, the administratrix *de bonis non* and legatees of the Crane estate ratified the acts of the Allisons, and accepted the stock as part of the Crane estate. By the agreement and the receipt from Mrs. Crane of the stock certificates, the stock was in equity transferred to the Crane estate, and although the stock may have remained in the books of the bank in the name of the Allisons, the stock certificates being received and the dividends accepted by Mrs. Crane, the Judge had power to direct the substitution of Mrs. Crane's

name in place of the Allisons. This agreement being executed in good faith and in full discharge of any claims by the Crane estate against the Allisons, the representatives are estopped from denying their liability in equity, as holders of the stock, and as by the agreement Mrs. Crane was bound to complete the transfer, and had the stock certificates, it was her duty to do so. The transfer would have been made but for the absence of the president, whose presence was necessary. The Judge had no power to place the names of the Allisons on the register, as the stock was all paid up, and no further liability exists againts the stockholders when the stock is so paid by the bank charter, (17 Vict. cap. 1). The learned Judge in his decision relied on the English cases, which are not applicable as they depend on the wording of their acts. The latest is Ward and Henry's case, (L. R. 2 Chan. Ap. 431 & 685). [RITCHIE, C. J.: All these cases were considered in the Overend Gurney case, L. R. 5 Eq. 193.] The English Act is different from ours, and the mode of transfer is different. I contend that Mrs. Crane was, in equity, owner of these shares, and that the bank recognized her as such, and she should be made a contributory. As to the question of registry, see Sayles *v.* Blane, (142 Q. B. 205). Wynne *v.* Price, (3 D. G. & Sm. 310). Walder *v.* Bartlett, (17 C. B. 446). Emmerson's case, (L. R. 2 Eq. 231). Walker's case, (same vol. p. 555).

A. L. Palmer, Q. C., was heard on behalf of the bank.

C. Milner against the appeal. The Winding-up Act must be construed with reference to the Act of Incorporation. The 4th section of that Act authorizes the bank to make by-laws, and by-law 14, made under that authority, gives a form of certificate of stock and a form of transfer. The 17th section of the Act provides for the mode of assignment, and the requisites of such assignment not having been complied with in this case, there was never any transfer of the stock to the Crane estate, and as it remains in the Allisons, they are liable as contributories, [RITCHIE, C. J.: I cannot imagine any thing clearer on the state of facts as they are presented to us, than that the Crane estate is entitled to indemnify the Allisons.] As to the agreement, I contend that the administratrix *de bonis non* had no power to make a binding agreement to affect the funds of the estate; she is simply the agent for the trustees. The Court here has no power to go into the equities of the case.

S. R. Thomson, Q. C., in reply. It seems to be conceded by the counsel for the Crane estate, that if the Court goes into the equities of the case, his clients must go to the wall. The only question is, as to the power of the Court under the Winding-up Act, 27 Vict.

cap. 44. I contend that there is a distinction between stockholders and contributories. The 15th section gives the curator power to sue stockholders or contributories, shewing that the terms are not synonymous. Contributories is a term which was not used here until this Act came in force, and the 200th section of the English Act, in defining what a contributory is, says that every one shall be deemed a contributory who is liable in law or equity, which is the case with the Crane estate. Our Legislature having passed an Act, intended to be an abstract of the English Act, the term contributory must be taken to have the same meaning as in the English Act, and if this is the case, that is an end to the argument. The 25th section of the Act gives the Judges the most ample powers, and authorizes them to make any orders they may deem just. The term "just" cannot be made to apply to matter of form, but to matter of substance. If the stock had increased in value fifty per cent. the Allisons could not have claimed a dollar of the benefit, and now that the contrary is the case, it is not just that they should be required to pay.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

This was an appeal from an order of Mr. JUSTICE WELDON, wherby he declared that the estates of C. F. Allison and Joseph F. Allison, were contributories in respect of one hundred and thirty-six shares of the stock of said bank, standing in their joint names on the books of the bank, and the estate of Joseph F. Allison, in respect of four shares standing in his individual name. There can be no doubt, from the facts set forth in the affidavit, that the whole of this stock was purchased with funds of Wm. Crane's estate, and held by the Allisons, they being executors of Wm. Crane's estate, for and on account of that estate, and that, by an agreement made on the 11th September, 1866, between Eliza Crane, administratrix *de bonis non* of the late Wm. Crane's estate, and the heirs and legatees of the said Wm. Crane, of the one part, and Henry B. Allison, jr., executor of C. F. Allison, and H. B. Allison and A. E. Botsford, and Mary, his wife, executors of Joseph F. Allison, Milcah Allison, the widow of the late C. F. Allison, and Mary Allison, the daughter of the said C. F. Allison, of the other part, *inter alia*, that all the cash in hand, bank stock belonging to the Crane estate, and within the control of the parties of the second part, should be, by them, on or before the 15th day of September then next, paid, handed over, and transferred to the said Eliza Crane, and that all parties of the second part should execute all documents required of them by the parties of the first part, and do all acts necessary for carrying out the arrangement.

Under this agreement, Mrs. Crane received the stock and certificates and gave a receipt under her hand, "Scrip shares and debentures, 7 certificates on the Bank of Westmorland, representing £3,576 9s. 5d., 28th September, 1866, received by Mrs. Crane, as administratrix of the Crane estate."

The stock was not transferred, at the bank, to Mrs. Crane, in consequence, it is alleged, of the absence of the president, whose presence the parties appear to have considered necessary to complete the transfer. An order, for H. B. Allison to sign, was drawn by the solicitor of Mrs. Crane, as follows:—

To the President and Cashier of the Westmorland Bank of New Brunswick:

DEAR SIR,—I hereby request and authorize you to pay to account of Mrs. Eliza Crane, at the Bank of New Brunswick, St. John, the amount of dividend now due upon the £3,500 stock, standing in your books, in the name of the executors of the late Wm. Crane.

Yours truly,

H. B. ALLISON,

Executor of the last will and testament of Joseph F. Allison, surviving executor of the last will and testament of the late William Crane, deceased.

This order H. B. Allison signed as requested, and it was acted on and the dividend paid as therein directed, and received by Mrs. Crane, as holder of the stock for the Crane estate. In the winding up proceedings the curator placed the name of H. B. Allison on the list of stockholders liable to contribute, as representing one hundred and forty shares. Upon a hearing to settle who were contributories, counsel appearing on behalf of H. B. Allison, and on behalf of the estates of C. F. and J. F. Allison, and of William Crane, Eliza Crane, administratrix, and the legatees of William Crane, it was urged on behalf of H. B. Allison that he was only an agent, and his name not appearing in the registry of stockholders, or on the stock certificates, or on the books of the bank, as representing these shares, he was in no way liable to be placed on the list of contributories. The learned Judge adopted this view, and ordered the name of H. B. Allison to be removed from the list, and declared the estates of C. F. and Joseph F. Allison, stockholders for one hundred and thirty-six shares, and the estate of J. F. Allison, for four shares, the said stock standing in their own names in the books of the bank, and evidenced by the certificates issued by the company, under their seal, in accordance with by-law 14 (which provides form of certificates and transfer) and by which it was certified that C. F. Allison and J. F. Allison were holders of so many shares in the capital stock of the Westmorland Bank, and that the whole or any number of shares thereof is transferable by the said C. F. and J. F. Allison, only at the bank aforesaid, by their appearance there in person, or by their legal rep-

resentatives, in case of their death, being authorized thereto, or by their sufficient attorney thereto, lawfully authorized, and their producing this certificate. And the learned Judge held the said Allisons or their representatives liable, as such stockholders, to be placed on the list of contributories. The representatives of these estates claim that Mrs. Crane, as administratrix of the estate of William Crane, has the equitable title to this stock, and is, therefore, the proper person to be placed on the list.

It cannot be doubted that these shares were never legally transferred to Mrs. Crane, though no doubt entitled to have the transfer completed, the 17th section of the Act of Incorporation declaring "that the shares and capital stock shall be assignable and transferable, according to the rules and regulations that may be established in that behalf, but no assignment or transfer shall be valid or effectual unless such assignment or transfer shall be entered and registered in a book to be kept by the directors for that purpose, nor until such person or persons so making the same shall previously discharge all debts actually due and payable to the said corporation (no fractional part of a share assignable), and whenever any stockholder shall transfer in manner aforesaid, all his stock or shares in the said bank to any other person or persons whatever, such stockholder shall cease to be a member of the said corporation." Nor can it be doubted that the legal representatives of the registered stockholders are the persons at law *prima facie* legally liable to contribute to the payment of calls properly made on the stock standing in the name of the parties they respectively represent. Was the Judge, then, bound to set aside this primary legal liability, and substitute the party equitably entitled to the stock in their place, or was he right in leaving the stock register untouched, and the representatives of the registered stockholders liable for the calls, leaving them to seek indemnity for any payment they might be compelled to make from the equitable owner of the stock in a Court of Equity? Joseph F. Allison and C. F. Allison, by being the registered owners of these shares, incurred a statutory liability from which we cannot think the Judge should have released them. But if this was for the benefit of third parties, or they had entered into any arrangement by which, in equity, third parties should protect them from loss, to such parties, then, must they look for indemnity? The creditors of the bank and the co-contributories have a right to avail themselves of their liability, and they have no right, in the proceedings for winding up the company, to insist on other parties being substituted in their place and stead, and this more particularly as no default whatever was shewn on the part of the bank, whereby the transfer was prevented from being made, the laches, if any, being wholly with the parties immediately inter-

ested in the transfer. In saying this, we wish to be understood as expressing no opinion on the duty or power of the Court or Judge, to order a list of contributories to be made, or on the effect of such a list, if made. No such question has been raised in this case, and we only decide the point presented to us, viz., that the Judge was right in not altering the register of the stockholders of the bank. Appeal dismissed with costs.*

POURRIER AND WIFE *v.* RAYMOND *et al.*

JUNE 11, 1869.

Where a husband and wife reside on land of which the wife has the fee, the husband is tenant by the courtesy, and the crops raised by his labor and the labor of his servants and children are his and liable to seizure for his debts, and the sheriff may enter to make a levy. In the absence of title, the possession is the possession of the husband.

This was an action of trespass for entering on land which was alleged to belong to Euphemie Pourrier, the wife, and taking and carrying away the crops, tried before RITCHIE, C. J., at the last Kent Circuit. The defendant, Raymond, was sheriff of the County of Kent, and justified the entry on the land and seizure of the crops under a judgment and execution against Maxime Pourrier, the husband, at the suit of Smith, the other defendant. The title of the land was in Seraphie Casey, the wife of Fidele Casey, who, on the 16th June, 1863, made a deed of the land to the female plaintiff. This deed was not duly acknowledged by the wife, and was never recorded, and there was no livery of seizin. For many years prior to the making of this deed, the plaintiffs lived on the land with their children, and cultivated it. When the deed was given there was no change in the possession, and the husband continued to work on the land as before.

The learned Judge told the jury that to enable the plaintiffs to recover they must be satisfied that the land was the property of Euphemie Pourrier, the wife. If it was, under the Act of Assembly it could not be taken for the debts of the husband. That if the wife was seized in fee of the land the husband would be tenant by the courtesy, and that if he cultivated the land as such, by his own labor, or that of his servants and children, the produce would be his and liable to seizure for his debts, and the sheriff would have a right to enter on the land to make the levy. That in the absence of title, the possession would be the possession of the husband, and the

*Allen, J., took no part.

property in the crops his also. That if they found that Pourrier, the husband, was in possession before the deed was made, and that there was no change in his possession afterwards, no registration of the deed, and no livery of seizin, and that the land was worked by him for his own benefit, by himself and servants, the property was his and liable to seizure. The jury having found a verdict for defendants,

A. L. Palmer, Q. C., in Michaelmas Term last, obtained a rule *nisi* for a new trial on the ground of misdirection. He contended that although the unregistered deed did not pass the title, it made the wife the tenant at will of the owner in fee, and that her possession was as good against a third party, as if she had a registered deed of the land.

S. R. Thomson, Q. C., shewed cause in Hilary Term. I cannot see what *locus standi* the plaintiffs have here at all, for, in the absence of title, the possession was clearly the possession of the husband. There was no evidence whatever that the crops belonged to the wife, and it will not be contended that the wife has any property in her husband's goods during his lifetime. Even if the deed had been registered, the husband would have been tenant by the courtesy, and the crops, the produce of his labor, liable to seizure.

A. L. Palmer, Q. C., contra. I deny that the husband can be tenant by the courtesy until the wife dies. There was no property in the husband, against whom the execution issued; the land belonged to a third party up to the time the deed was made; and the gift to the wife in the deed created an estate as fully as if it had been given by a properly registered conveyance; the wife became, at least, tenant at will. [RITCHIE, C. J.: The practical effect of your contention would be that a party might expend capital in improving land, raise and reap an enormous crop, and if a servant sued him for his wages, and seized a portion, he might contend that the crops were the property of his wife]. I contend that the wife's estate in the land was just as good against all the world, except the owner of the fee, as if she had held it in fee simple.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

Trespass for entering on land alleged to belong to Euphemie Pourrier, the female plaintiff, and taking and carrrying away crops.

The title to the land was in Seraphie Casey, the wife of Fidele Casey, who made a deed to the female plaintiff on the 16th June, 1863, but which, not being duly acknowledged by the wife, was not

registered, and there was no livery of seizin. At the time this deed was given, Pourrier, the husband, was in possession of the land, and had been so several years, his wife living with him, and with their children, assisting him in working and farming the land; there was no change of possession after the execution of the deed. The defendant, Raymond, was sheriff of the County of Kent, and justified the entry on the land, and the seizure and sale of the crop, under a judgment and execution against Maxime Pourrier, the male plaintiff, at the suit of the other defendant, Smith,

It was contended on behalf of the plaintiffs that although the deed to Euphemie did not convey the title to her, in consequence of it not being registered, that she was in possession of the land, and had some interest in it, either as tenant at will or some higher estate, and that the crop grown on the land belonged to her and, under the Rev. Stat. c. 114, was not liable to be seized for her husband's debts.

The Chief Justice told the jury that to enable the plaintiff to recover they must be satisfied that the property seized, and for the taking of which damages were claimed, was the property of the female plaintiff; if it was, then, under the Act of Assembly, it could not be taken in execution against the husband. If the wife was seized in fee of the land, the husband would be tenant by the courtesy, and if, as such, he cultivated the land for his own benefit, by his own capital or labor, or by the labor of his servants or children, to whose services he was entitled, then the proceeds of such cultivation would belong to him, and be liable to the execution, and if he was in possession of the land as such tenant the sheriff would have a right to enter and levy. That if they found that Pourrier was in possession at the time the deed was signed, and there was no change of that possession, no registration of the deed, and no livery of seizin, and the farm was worked by Pourrier and his servants, then the right was in him and not in his wife. That the occupation of the land by Pourrier, his wife and family, in the absence of title in any of them, would, in law, be his possession, and the produce of the land, raised by him and his family, would be his property and liable to execution against him.

The jury having found a verdict for the defendants, it was contended that there was a misdirection, and that the jury should have been told that the female plaintiff had some estate in the land which would vest the possession in her. We think, however, that the case was properly left to the jury, and that the evidence is quite sufficient to sustain the verdict.

Even if the wife had an estate in the land, (which we do not admit), by common law, the husband would have the right to the possession, and would be entitled to the rents and profits. What-

ever the effect of the Rev. Stat., c. 114, may be upon the rights and of the husband, it does not exempt the produce and profits of the wife's land, of which the husband is in possession, and which produce and profits are created by his labor, from being taken in execution against him. In Dow *v.* Dibblee (*ante* 55) the farm was worked under the direction of the wife, without any interference by the husband, and the produce of the farm was the result of her capital, not created by the labor or capital of the husband. Here the jury have found not only that the crop was raised by labor of the husband, but that the land was actually in his possession, and not in the possession of his wife, and therefore she was improperly joined as a plaintiff in the suit.

This disposes of the objection that though the seizure of the crop might be justified under the execution, the entry on the land, which was in the wife's possession, was not justified.

Rule discharged.

PECK *v.* BARBARIE.

JUNE 11, 1869.

A commissioner appointed to examine insolvent confined debtors, was held disqualified from holding an examination in the case in which the plaintiff was a first cousin to his wife.

The defendant in this cause was arrested at the suit of the plaintiffs by a writ of *capias*, issued out of the County Court, and gave bail agreeable to 31st Vict., cap. 10, sec. 13. He was afterwards rendered in discharge of bail, and examined under the Insolvent Confined Debtors Act before George Calhoun and Henry J. Bennett, two commissioners appointed to examine insolvent confined debtors, who, on the 13th January, 1869, made an order discharging the defendant from custody as to that suit. An application was made on behalf of plaintiff before Weldon, J., at chambers, for a rule *nisi* for a *certiorari* to remove the proceedings, on the ground that Calhoun, one of the commissioners, was married to a first cousin of the plaintiff. A rule *nisi* having been granted,

F. E. Barker shewed cause in Easter Term last. This application is too late. It should have been made in Hilary Term. The plaintiff heard of the order of discharge on the 16th January, as he admits by his affidavit. He should, therefore, have moved sooner, and the Court leaning *in favorem libertatis*, will not favor this application. Independently of the delay the affinity does not affect the parties. This is not like a case where there is pecuniary interest.

The slight relationship will not affect the proceedings, and the commissioner having acted has a right to make the order. This differs materially from the case of a trial before a Judge.

D. L. Hanington, contra. The relationship of the commissioner to one of the parties is certainly sufficient to make the proceedings bad. Coke on Littleton, 157*a*, shews that it is a good ground of challenge to a juryman that he is related to either party, however remote the relationship may be, and that affinity or alliance by marriage is equivalent to consanguinity and principal challenge. If this is the case with a juryman, it should equally apply to a commissioner, who sits as a Judge. The plaintiff explains the delay in his affidavit by stating that he could not get copies of the papers in time to apply at last Hilary Term, but the delay has not injured the defendant. The plaintiff used due diligence. *Ex parte* Mulhern, 4 Allen 259.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

We think the relationship or connection existing between one of the Justices and the plaintiff disqualified him from acting. If this would be a good ground of challenge to a juryman, *a fortiori*, it should be sufficient to make it improper for a Judge to act. We are quite sure in this case that the commissioner who did act was not in the slightest degree influenced by any improper motive, and only sat because he esteemed it his duty to do so, but on this point the law is wisely and rigidly jealous. Anciently in England, a Judge coud not try a civil or criminal case in the County in which he was born or inhabited, but that impediment and exclusion proving exceedingly inconvenient, an indulgence of unnecessary jealousy, was expressly, altered by statute.

In Becquet *v.* Lempriere, (1 Knopp. P. C. C. 376), in the Privy Council, it was held that a Judge could not sit in that character, in a cause where his deceased wife's nephew was interested, because the feelings of such collateral relationship are not to be considered as determining with the death of his wife, evincing, as Mr. Chitty says, that the slightest degree of relationship would induce a Judge to decline interfering. As observed by Lord Tenterden in Dauncy *v.* Berkley, (T. T. 1827, 3 Chitty, G. P. 10), it is most important for the administration of justice that in every department it should be free from the breath of suspicion. Under the circumstances of this case we think there was no such delay as should preclude us from entertaining this motion. This renders it unnecessary to express any opinion on any of the other points suggested.

ARMSTRONG *v.* MCCAFFREY *et al.*

JUNE 11th, 1869.

Justices of the Peace acting judicially, are Judges of Record, and have power to commit to prison orally without warrant for contempt committed in the face of the Court.

They have no power to commit to the lock-up house at Woodstock.

In trespass for false imprisonment against Justices of the peace where the justices had exceeded their powers in commiting the prisoner to an improper place of imprisonment for contempt, but where the plaintiff had received no greater punishment than he was entitled to by law, the Judge offered to direct the jury to find a verdict for the plaintiff with nominal damages. The plaintiff refused to accede and claimed substantial damages, whereupon ihe Judge nonsuited him, and the court refused to set the nonsuit aside.

Trespass for false imprisonment, tried before Weldon, J., at the last Carleton Circuit; the defendants were Justices of the Peace for the County of Carleton, and the plaintiff was tried before them on a charge of assault, found guilty and a fine imposed. When called up to hear his sentence he behaved in a boisterous manner, and made use of insulting expressions to the magistrate, who orally ordered him to be committed for contempt. He was thereupon taken to the lock-up house in Woodstock, where he was detained six hours, which was the trespass complained of. The learned Judge was of opinion that the plaintiff, having been guilty of the contempt, was, by Rev. Stat., cap 129, § 11, only entitled to two-pence damages, and offered to leave the case to the jury, with a direction to limit the verdict to that sum, but as the plaintiff's counsel declined to go to the jury upon these terms, claiming a right to substantial damages, the learned Judge ordered a nonsuit.

Needham, in Michaelmas Term last, obtained a rule *nisi* to set the nonsuit aside on the grounds: 1. That the Justices had no power to commit the plaintiff orally for contempt. 2. That they had no power to commit him to the lock-up house.

S. R. Thomson, Q. C., shewed cause in Hilary Term. The plaintiff in this case must be nonsuited, for it was clear that whether the magistrates acted legally or illegally, there was reasonable and probable cause for committing him. Kemp *v.* Neville (10 C. B. N. S. 523) is a case in point. There was no malice proved in this case; it was clear from the evidence that the punishment inflicted on the plaintiff was not more than is assigned by law, and as he refused to accept a verdict for nominal damages, the nonsuit must stand.

Needham, contra. The law gives a Justice of the Peace no authority to imprison for contempt. The action is for false imprisonment in a certain place. The only reasonable and probable cause

that will excuse that is reasonable and probable cause for putting him there. If the Justices had no power to commit without warrant, there was no reasonable and probable cause. The Justices had only power to try him for the assault; then their functions ceased. Suppose that their sentence had been that he should pay a fine, or, in default of payment, be committed to gaol for ten days, and on his refusing to pay they had given the constable a verbal authority to take him to gaol, would that have been a justification of reasonable and probable cause? The reasonable and probable cause does not apply to the contempt, but to the act for which the action is brought.

RITCHIE, C. J., now delivered the judgment of the Court.

The questions in this case are, whether Justices of the Peace have power to commit for a contempt; and if they have, whether they were right in committing the plaintiff to the lock-up house. As to the first question: At the time the contempt was committed by the plaintiff, the defendants were acting as Justices of the Peace, trying a complaint for an assault, under 1 Rev. Stat., c. 159, § 27, which authorizes the Justices, on conviction, to fine the offender, and, no non-payment of the fine, to imprison him in the gaol. In Bac. Abr. "*Courts*," (D 2), it is said that "every Court, by having power given it to fine and imprison, is thereby made a Court of Record, the proceedings of which can only be removed by writ of error or *certiorari*." In the case of the College of Physicians (Salk. 200; 12 Mod. 386) Lord Holt says that wherever there is a jurisdiction created with power to fine and imprison, that is a Court of Record, and what is there done is matter of record. In Hawk Pl. Crown (Book 2, ch. 1, § 14), it is said that all Courts of Criminal Jurisdiction must be Courts of Record, for a Court which is not of record cannot impose any fine on an offender; and that all such Courts have power to fine and imprison for contempts committed in the face of the Court. In Rex v. Revel (1 Stra. 420) the Court said that where insulting words are spoken in presence of a Justice of the Peace he may commit; and for contempt in the face of the Court, it is said in Bac. Abr. "*Courts*" (E) that Courts not of Record may commit. If, pending the examination on an information for a criminal offence, any person insults the magistrate, he may be committed for the obstruction of justice. (1 Chit. Crim. L. 88).

In Chaney v. Payne, (1 Q. B. 704), Lord Denman said that convictions had always been treated as records. Formerly, in England, convictions were drawn up on parchment, which was necessary in case of records—Paley Conv. 157—and the Act of Parliament 11 and 12 Vict. c. 43, and our Act of Assembly 12 Vic., c. 31, § 17, authorized

their being drawn up on paper. The general doctrine is that magistrates acting judicially are Judges of Record. Thus, it has been held that they are Judges of Record when proceeding under the 11 Geo. II., c. 19, (Landlord and Tenant Act); Basten v. Carew, (3 B. & C. 649). See also *In re* Hammond, (9 Q. B. 92). In Kemp v. Neville, (10 C. B. N. S. 552), where the Vice Chancellor of the University of Cambridge has, by charter, power of imprisonment in certain cases, it was held that the power made him a Judge of Record; and it was said that all the Judges of Record have power "to commit to the custody of their officers, *sedente curia*, by oral command, without any warrant made at the time." As the defendants in this case, at the time they imprisoned the plaintiff, were acting judicially in a proceeding in which they had power to convict, fine and imprison, and the contempt was committed by the plaintiff in the face of the Court, we think they had the power to imprison him; but we do not think they had any power to commit him to the lock-up house. The Act 15 Vict. c. 9, relating to the lock-up house in Woodstock, enacts that it "shall be lawful for the sheriff or any other officer having legal custody of any person who may be arrested at or near the Creek village, in all cases in which the said sheriff or other officer could legally lodge the said person in the common gaol of the said County, to commit the said person to the said lock-up house until the said person can be removed to the said County gaol or otherwise discharged."

It is not intended as a prison to which a person convicted of an offence can be sentenced to undergo imprisonment, or can be committed for trial on a criminal charge; but merely as a place of temporary security in which a prisoner can be confined by the sheriff or a peace officer until he can be taken to the gaol, or brought before a Justice of the Peace for examination for some alleged offence. For this imprisonment the plaintiff was therefore entitled to a verdict; but as he was clearly guilty of the offence of which he was convicted, and suffered no greater punishment than that assigned by law to the contempt, he was only entitled to recover two pence damages, under the 11th section of the Rev. Stat. c. 129. The learned Judge offered to leave the case to the jury, with a direction to limit their verdict to this sum, but the plaintiff's counsel declined to go to the jury upon these terms, claiming a right to substantial damages, and the learned Judge then ordered a nonsuit. Under these circumstances, we think the plaintiff has no right to complain, and that the rule must be discharged.*

Rule discharged.

* Fisher, J., took no part.

REGINA *v.* THE ASSESSORS OF RATES, KINGS.

JUNE 11th, 1869.

Where an assessment was ordered on the 20th October and a rule *nisi* for a *certiorari* obtained at Chambers on 27th February returnable in Easter, the Court held the application to be in time.

The provisions of 1 Rev. Stat. cap., 53, § 6, requiring security for costs before granting a *certiorari* to remove a rate, is not incorporated in the Parish School Act.

The General Sessions has no power to order an assessment as for County contingencies, to meet the costs incurred by a party in making, and by the assessors in resisting an application to quash an assessment under the Parish School Act.

Crawford, in Easter Term, shewed cause against a rule *nisi* for a *certiorari* obtained before WELDON, J., at Chambers, to remove the assessment and proceedings in this case for the purpose of quashing the same. The application was made on behalf of one Frost, one of the ratepayers, and it appeared by affidavits that the assessment complained of had been ordered by the sessions on the 20th October last for the purpose of paying the costs and expenses incurred in quashing an assessment upon School District No. 2, in the Parish of Norton, under 21 Vict. cap. 9, relating to Parish Schools. The General Sessions of Kings County ordered both the costs of the party who applied to quash the assessment, amounting to £14 12s. 9d. and the costs of the assessors in resisting the application, amounting to £11 14s. 11d., to be assessed upon the Parish of Norton under the Rev. Stat. cap. 55, as part of the contingent expenses of the County. In moving for the rule, it had been urged that the sessions had no power to assess the costs incurred in quashing an assessment under the Parish School Act as County contingencies, and that if they had, the assessment should have been on School District No. 2, and not upon the whole Parish of Norton. He produced affidavits shewing that the applicant had not filed any security for costs, and contended: 1. That the application was too late, the assessment having been ordered in October, and that, therefore, this application should have been made in Hilary Term. 2. That no security for costs having been filed as required by 1 Rev. Stat., cap. 53, § 6, the application must fail. 3. That if the *certiorari* was granted it should be against the General Sessions and not the assessors. [RITCHIE, C. J.: I do not think there is any thing in the last point.]

F. E. Barker, contra. 1. As to the application being too late the granting of a *certiorari* is a matter in the discretion of the Court, and there is no fixed and inflexible rule with respect to time. It was a matter for the Judge to consider when he granted the rule *nisi* at Chambers. *Ex parte* Mulherrin, (4 Allen 260), shews that whether there has been delay or not is a matter for the discretion of the Judge in granting the rule, and that when it is granted the ques-

tion of delay is disposed of. 2. This assessment having been made without any authority and being a matter entirely outside of the jurisdiction of the sessions, it is not necessary to file any security for costs. There is no law to authorize an assessment such at this, which is one for costs alone, and even if they could order an assessment to pay the costs of the assessors they could not assess the costs of the applicant. It is not necessary to file security for costs unless the application is against an assessment such as is contemplated by law.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

The assessment in this case was ordered on the 20th October last, for the purpose of paying the expenses incurred in quashing an assessment upon School District No. 2, in the parish of Norton, under the Act. 21 Vict., c. 9, relating to Parish Schools.

The costs of the applicant to quash that assessment amounted to £14 12s. 9d., those of the assessors in resisting the application, to £11 14s. 11d., both of which sums the General Sessions of King's County have ordered to be assessed upon the Parish of Norton, under the Rev. Stat., c. 55, as part of the contingent expenses of the County. An order *nisi* for a *certiorari* to remove this assessment was made at Chambers on the 27th February last, and in shewing cause a preliminary objection was taken that the application was too late, that the assessment having been ordered in October, *certiorari* should have been applied for in Hilary Term. The affidavit of Frost, the appellant in this case, does not state when he first had knowledge of the order for assessment. At the time he made the application the warrant of assessment was in the hands of the collector. By the English Stat. 13, Geo. II., cap. 18, a *certiorari* must be applied for within six calendar months after the making of a conviction or order; and where there has been an appeal, the *certiorari* may be applied for within six months after the confirmation of the order, Paley Conv. 416. In *ex parte* Gerow, (4 Allen 269) an order *nisi* to remove a rate had been obtained in March, 1859, a levy had been made on the applicant's property in December previous, and it was sold in February, the Court held that the application should have been made in Hilary Term. In *ex parte* Mulhern, (4 Allen 259) the conviction took place in April, and no application for *certiorari* was made till July following, and though Parker, J., said that he thought he should not have granted an order where the party had allowed a term to elapse without applying to the Court, that was a matter for the determination of the Judge to whom the application was made. It appears, therefore, that this Court has not

adopted any inflexible rule that the application *must* be made at the first term after the making of the conviction or order, that it is sufficient if it is made within a reasonable time, which must depend upon the circumstances of each case. In the present case, no doubt an application might have been made to a Judge in Michaelmas Vacation, and the order *nisi* made returnable in Hilary Term, but we think the party was not bound to apply till Hilary Term, and if he had applied in Hilary and obtained a rule *nisi*, it would not ordinarily have been made returnable till Easter Term, so that in point of fact the proceedings now are as much advanced as if the rule *nisi* had been obtained in Hilary Term. Under these circumstances we are inclined to think the application is not too late.

2nd. It was objected that this application must fail because no security had been given to prosecute the *certiorari* with effect, as required by 1, Rev. Stat. 53, § 6, which provision, it was contended, was incorporated in the Parish School Act. By the 11th section of that Act the assessment is to be "levied and collected in the same manner in all respects as other County or Parish rates," and by section 16, after providing that the assessment list shall be delivered to the collector, it is declared that "such proceedings shall be had and taken thereon for the levying and collecting the same as are provided in other cases of County or Parish rates." It may be a question whether the provision requiring security to be given before applying for a *certiorari* is not confined to cases where the assessors of a Parish have appealed from a rate under sec. 3; but at all events we think those sections of the 21 Vict., c. 9. evidently point to the duties of the assessors in making up the assessment list, and of the collectors in levying the rate, as provided for in Cap. 53 of the R. Stat., and have no reference to the proceedings for quashing a rate. A *certiorari* is of common right, and the power of granting it is not to be taken away or abridged by implication. We think the provision requiring security before granting a *certiorari* to remove a rate is not incorporated in the Parish School Act, and therefore that the common law right of *certiorari* in such cases is not abridged. The question, then, is whether the applicant is entitled to relief on the merits; and this depends upon, 1st, whether the costs incurred in quashing an assessment under the School Act can be considered as County contingencies; and, 2nd, if they can, whether the assessment can be made upon the whole Parish, or only upon the school district in which the assesment for suport of the school was agreed to.

As to the first point. We cannot see upon what principles a private individual who feels himself aggrieved by a rate, and incurs costs in applying to the Court to quash it, can claim to have those

costs paid out of the public funds as part of the contingencies of the County, the Court in which the proceedings were taken giving no costs in cases of *certiorari*. Suppose on an application for a *certiorari* that the assessors should be satisfied that a rate could not be sustained, and, in consequence, did not resist the application, and incurred no expense (as we think they ought to have done in the case out of which this application arises) in reference thereto, could it be said that the expenses of the party at whose instance the rate was quashed were part of the contingent expenses of the County? So far as relates to the £14 12s. 9d. we think this assessment was clearly bad.

Admitting that the expenses incurred by the assessors in resisting an application to quash an assessment might in some cases be considered as part of the contingent expenses of the county, they being public officers in the discharge of a public duty, we cannot find any authority in the statute to order an assessment upon a parish to pay any of the costs arising out of the proceedings taken in a district of a parish, under the Parish School Act. It is only by the express words of a statute that taxes can be imposed. If it is desirable that the costs in cases of this kind should be assessed upon a county or parish, the Legislature must make provision for it. The rule must be made absolute for the *certiorari*.

GREEN *v.* THE MAYOR, &c., OF ST. JOHN.

JUNE 19th, 1869.

A municipal corporation is liable to an action for negligence in the discharge of any duty imposed upon them.

The plaintiff, while a passenger on board the ferry boat, in St. John, was injured by the falling of a pile, which formed part of the approach to the ferry landing. Held, That the defendants, being the owners of the ferry, were liable, and were not relieved by the fact of the ferry being leased to a third party.

This was an action on the case tried before ALLEN, J., at the St. John January Circuit, to recover damages for injuries caused to plaintiff by the negligence of defendants, in not keeping in repair a fender, which formed a portion of the approach to the ferry landing in St. John harbor. The plaintiff was on board the ferry boat, passing from Carleton to St. John, and on approaching the landing, the boat struck the fender, which broke and fell upon the plaintiff, breaking her thigh. The jury found a verdict for the plaintiff, damages $4,000.—The declaration and material facts are so fully set

out in the judgment of the Court, that it is unnecessary to detail them here.

B. L. Peters, Q. C., in Hilary Term last, obtained a rule *nisi* for a new trial, on the grounds:—1. Misdirection in not telling the jury that the defendants were not liable for any latent or hidden defect in the fender erected by their contractor, or for the use of any improper materials by the contractor, and that they having done all in their power to secure a skilful person, were not liable, nor for any defect by the wearing away of the fender. 2. In not directing the jury that the defendants, having leased the ferry, as allowed by the charter, were not liable for the acts of the lessee, he being forced to repair. 3. In leaving to the jury whether the fender was originally defective, there being no evidence to warrant such a question. Also, that the verdict was against law and evidence.

S. R. Thomson, Q. C., shewed cause in Easter Term. I do not see in what other way the learned Judge could have directed the jury than the way he did. The piles were put down by the corporation, in 1858, as proved by the evidence of Mays. Clark proved, from examination of the pile, that it had been originally defective, and that there were only about three inches of sound wood. It had also been worn by the constant abrasion of the ferry boats in striking against it. The mode of fastening, by an unyielding iron bolt, was clearly improper; and that alone is sufficient to fix the corporation. The clause of re-entry in the lease is peculiar, and shews that defendants knew they were responsible, for it gives the power to re-enter not only for non-payment of rent, but for failure to keep in repair, which shews that they retained the whole thing in their own hands. The defendants having accepted their charter, which was for the public benefit, were bound to keep the ferry open, and could not shirk the responsibility by leasing it. The only right given by the lease, to the lessee, was the right of passing over the harbor. The duty of keeping the piles in repair was cast upon the defendants, if not there was a ground of demurrer at once. The negligence of the defendants is manifest, and the jury have found the allegations in the declaration proved. No corporation that has a duty cast upon it for a public purpose can escape that duty by leasing it to a third party, and if leased the lessee is only their agent, and they are responsible for his acts. This corporation having, by charter, power to establish ferries, it was obligatory on them to establish them, and equally obligatory to continue them. The King *v.* the Mayor, &c., of Hastings, (1 Dow. & Ry., 148), is conclusive on this point. In that case, the charter declared that the Mayor and Jurats might hold a Court, but it was held that the words of permission must be

held to be compulsory if in an Act of Parliament, or for a public benefit. The King *v.* the Steward, &c., of Havering, (5 B. & Ald., 691), is to the same effect, and decides that words of permission, in a public charter, must be taken to be obligatory, and this is confirmed by Coe *v.* Wise, (L. R. 1 Q. B., 711), which decides that a company or corporation is responsible for the acts of its servanta. Here an agency exists to all intents and purposes, for the defendants made the lessee their agent, for the purpose of carrying out the duty cast upon them. It would be simply monstrous if they could get rid of the obligation cast upon them by putting in a man of straw as their agent. Pickard *v.* Smith, [10 C. B., N. S., 470). As to the verdict being against evidence, a new trial will scarcely be granted on that ground.

B. L. Peters, Q. C., contended if there was any original defect in the pile, the corporation having acted to the best of their judgment and ability in obtaining a skilful contractor to place them there, are not liable; and the defendants having leased and disposed of their ferry to a third party during the time of the lease, are not responsible. There was nothing in the evidence to justify the jury in finding that there was an original defect in the pile, and for the same reason, in the absence of evidence, it should not have been left to the jury. Clark testifies that he found an old break in the pile, but that does not justify the finding that it was originally defective. The charter, while it gives the defendants power over the ferries, also gives them power to transfer, lease or sell them, and I contend that by leasing them the defendants became as free from responsibility as if they had sold them absolutely. This is a very different matter from the case of a public court, the holding of which is a duty cast upon a corporation by charter, but a ferry is a franchise, capable of being transferred. The lease of the ferries carried with it every appurtenant to them. Bartlett *v.* Baker, (3 H. & Col., 153). If the pile which caused the injury became defective through being worn away by the striking of the steamer against it, this was done by the lessee in the course of his use of the ferry, and he is responsible for the damage, and not the defendants, who by their lease transferred the ferries to him, with every appurtenant. The lessee was as much in possession of the piles as he was of the floats, by which the ferry was reached; they were transferred to him by the lease as much as if they had been specifically mentioned.

Cur. adv. vult.

ALLEN, J., now delivered the judgment of the Court.

This was an action on the case for negligence in not keeping in

repair a fender near the ferry landing at St. John, in consequence of which the plaintiff was injured.

The first count of the declaration stated that before and at the time of committing the grievances, the plaintiff was residing at Carleton, on the western side of the harbor of St. John, and had a right to pass from one side of the harbor to the other side thereof at all proper times in certain ferry boats running and plying between the east and west sides of the said harbor, upon payment of certain ferriage or reward in that behalf to be paid to the defendants or their agents or lessees, of which the defendants, on the 1st August, 1867, had notice. That his late Majesty King George the Third, by his letters patent, bearing date the 18th May, 1785, did, amongst other things, for himself, his heirs and successors, give and grant to the mayor, aldermen and commonalty of St. John, and their successors for ever, that the common council of the city for the time being, or the major part of them, (but no other person or persons whomsoever without the consent, grant or license of the said common council), should and might have the sole, full and whole power and authority of settling, appointing, establishing, ordering and directing such and so many ferries in snch and so many places as the said common council should see fit for the carrying and transporting people, horses, cattle, goods and chattels from one part of the city across the said river or harbor to the other parts thereof, or to and from the said city to any of the opposite shores; and should have full power to set, let or otherwise dispose of all or any such ferries to any person whomsoever, and to have, take, hold and enjoy the rents, issues, profits, ferriages, fees and other advantages arising and accruing from such ferries to their own use, without being accountable for the same to the said king or his heirs or successors. That afterwards, and before the committing of the grievances, &c., the said mayor, aldermen and commonalty accepted the said letters patent, and by virtue thereof established divers ferries over the river and harbor of the river St. John, and erected landing stages or floats for the purpose of enabling such ferry-boats to touch thereat, and to land and discharge on them people, horses, cattle, goods and chattels by them from time to time ferried over the said river or harbor, and did also procure, place and run upon the said ferries, divers steam ferry-boats for the purpose of ferrying over the said river and harbor people, horses, &c., for certain fees and rewards to the said mayor, &c., in that behalf to be paid by the persons using the said ferry-boats for the purpose of transportation. That in order to render the approach of the steam ferry-boats to the said landing stages or floats at the eastern end of the ferry near the foot of Princess street in the said city, more certain, available and easy, the defendants had caused to be suspended or fastened

at the side of the said ferry approach a ferry-slip, or to be otherwise put and placed there, divers large and heavy piles of wood called fenders, on each side of the water-way leading from the open harbor to the said floats, against which the said steam ferry-boats were intended to strike, or were liable to strike upon being steered into the said water-way or ferry-slip leading to the said landing stages or floats. That it was and is the duty of the defendants to keep the said piles or fenders well and properly fastened or secured, so that they might bear the shock of being struck by the said ferry-boats without breaking or falling, and without being dangerous to passengers on board the said ferry-boats. That it was and is also the duty of the defendants to keep on board the said ferry-boats fit and proper persons to run and take charge of the same, in every way competent to steer and manage the said boats whilst engaged in ferrying passengers from one side of the harbor to the other. That the plaintiff on the 2nd August, 1867, was lawfully on board one of the said steam ferry-boats running on one of the ferries so granted to the defendants and established by them as aforesaid, as a passenger, and was being ferried in the said boat from Carleton to the east side of the said harbor, for certain reward in that behalf paid to the defendants, or to the lessee of the defendants or the person then in charge of the said ferry-boat, and it then and there was the duty of the defendants and of the persons in charge of the said ferry-boat to steer the same properly, skilfully and carefully, and not to approach or run against the said piles or fenders with too great force and violence. Yet the defendants, not regarding their duty, did not keep the fenders or piles well and properly fastened or secured, but on the contrary thereof, suffered and permitted many of them to be badly and insufficiently fastened and unable to bear the shock of the said ferry-boat, and to become unsafe and dangerous, and liable to fall upon being struck by the said ferry-boat. And the defendants further neglecting their duty in that behalf, did not by their said servants and agents, lessees or other persons in charge of the said ferry-boat, while the plaintiff was so on board, properly, skilfully and carefully manage the same, but steered and run it with great force and violence against the said piles or fenders, whereby one of the said piles or fenders being so improperly and insufficiently secured and fastened, broke and fell upon the plaintiff, then being a passenger on board the said ferry-boat, and without any fault on her part, greatly and seriously bruised her and broke her thigh. By means of which grievances the plaintiff became and was sick and lame, and suffered great pain for a long time, and still is suffering, &c., and is likely never to regain the use of her limb.

The second count alleged the grant of the ferries by the Crown to

the defendants, and the establishment of ferries as in the first count, and then alleged that the defendants leased the ferry to one J. McSweeny, to hold for ten years, from the 10th July, 1860, (setting out the lease *verbatim*); that McSweeny entered under the lease and run ferry-boats on the ferry across the harbor; that before making the lease to McSweeny the defendants had erected piles or fenders on each side of the ferry-slip at the eastern end of the ferry at the foot of Princess street, against which piles or fenders the ferry-boats employed on the said ferry were, by reason of the action of the tides, winds or currents of the harbors, liable to be carried and driven. That after the making of the lease and at the time of committing the grievances, it was the duty of the defendants to keep the piles and fenders properly and securely fastened so that they might bear the shock of the ferry-boats when they should be driven against them. Breach—that the defendants did not keep the piles or fenders properly and securely fastened, &c., but carelessly and negligently suffered and permitted them to become loose and insufficiently fastened, and unable to resist the shock of the ferry-boats; by means whereof, while the plaintiff was lawfully on board, &c., when the boat was approaching the landing at the foot of Princess street, the said ferry-boat was, by the action of the tides or currents, carried and driven with great force and violence against the said piles or fenders, whereby one of the said piles or fenders, being so insufficiently fastened or secured, broke, and fell upon the plaintiff and broke her thigh.

The third count, after setting out the grant to the defendants and establishment of the ferry, alleged it to be their duty to keep and maintain the piles and fenders in good order and condition, and in such a state as not to be liable to break on being struck by the ferry-boats on entering the slip, and also to keep the piles properly and securely fastened, so that they would bear the shock of being struck by the ferry-boat without falling. Breach—that the defendants took such bad and insufficient care of the piles or fenders, and kept the same so badly, improperly and insecurely fastened, that by reason thereof, the ferry-boat having struck against the piles on entering the ferry-slip, one of the piles broke and fell upon the plaintiff, &c.

The fourth count alleged the injury to have happened by the carelessness, unskilfulness and improper management of the defendants' servants and agents in running the ferry-boat into the ferry-slip, and against the piles or fenders, whereby one of the fenders broke and fell upon the plaintiff.

By the charter of St. John, the Crown granted to the mayor, aldermen and commonalty of the city, among other things, the sole power

of establishing and regulating ferries across the harbor, in the terms set out in the declaration, and in pursuance of this power the corporation many years ago established a ferry across the harbor, from St. John to Carleton. There was a wharf at the landing-place on each side of the harbor, and on the eastern side there was a slip (so called) or approach to the landing, having a wharf on one side, and on the other side a double row of piles driven into the harbor, and projecting above the line of high-water mark. These piles were put down by direction of the corporation in 1858. They were logs about a foot in diameter, and were fastened together at the top by a stringer placed between the rows, with an iron screw-bolt passing through each of the piles and the stringer—the bolts being kept in their places by a nut on the end. The object of these piles was to guide the ferry-boat into the landing-place when the steam was shut off, the tides of the harbor rendering it difficult to enter the slip at low water, and in that state of the tide the boat, when coming in, generally struck against the piles, and many of them were, in consequence of this, very much worn. Repairs had been made to the piles at different times, but not at the place where the pile was broken which caused the injury in this case. At the time of the injury in August, 1867, the plaintiff was on board the ferry-boat coming from Carleton to St. John; and on coming into the slip, the boat struck against the piles, when one of them broke off, and fell over upon the plaintiff and broke her thigh. It was nearly low water at the time, and the boat was going at ordinary speed, and it did not appear that there was any want of skill or care in the management of the boat. Several witnesses stated that at the time the boat struck, the bolt which had secured the pile at the top was broken. Clark, the only witness who examined the pile after the accident, says that it was broken off about three or four feet above the ordinary low-water mark; that the piece which fell was at least twenty feet long; that there was an old break in the pile on the back part, and only about three inches of sound wood; that the face of the pile was sound about three inches; that it was worn about one quarter through from the round; that it was flattened to about that extent. Another witness said that it was half or two-thirds worn through by the repeated striking of the boat.

At the time of the injury the boat was under the management of J. McSweeny, under a lease from the corporation, dated February, 1860, whereby they demised and leased to McSweeny, his executors, &c., the exclusive right of ferriage over and upon that part of the harbor of St. John which lies within the city of St. John, together with the steam ferry and all and singular the tolls, rates, fees and sums of money receivable in respect thereof, with full power and

authority for him, his executors, &c., to collect and receive the same, according and subject to the scale, restrictions and regulations thereinafter expressed, to hold for ten years, from 10th July then next, at the yearly rent of £600, payable monthly, with a proviso for re-entry if the rent should be in arrears for twenty days, or if McSweeny should neglect to perform any part of the covenants or agreements in the lease on his part. The lease contained a covenant that all damage that might happen to either of the steamboats, or to any of the floats and landings, should be repaired by McSweeny with all reasonable despacth; and that all the wharves, floats, landings and fenders connected with the ferry-landings were to be placed forthwith in good order and repair by him, and should be kept and maintained by him, his executors, &c., continually in such good order and repair during the continuance of the lease.

The learned Judge directed the jury that the corporation having established a ferry under the power given them by the charter and coutinued to run it, were bound to keep it and the approaches and landings in a proper state of repair, so as to prevent injury to the public, who had a right to use the ferry; and the more difficult the navigation, the greater was the necessity on the part of the corporation for care and attention to see that proper materials were used in the construction of the fenders and landings, and that due vigilance was exercised to keep them in repair. That the lease of the ferry might alter the case, and though he was not free from doubt on the point, he should direct them that the lease did not relieve the defendants from liability, if the injury occurred from any defect in the construction, or neglect to repair the fenders, and not from the negligence or want of skill of the men on board the ferry-boat. That he did not think the lease gave McSweeney any right in the soil where the piles were driven, that it was only a lease of an incorporeal right, the right to ferry across the harbor, which, as a necessary incident, would give the lessee the right to use the floats and fenders which were necessary for the ferry, but gave no right in the soil.

The following questions were left to the jury: 1st. Was the injury to the plaintiff caused by the negligence or want of skill of the men employed on board the ferry-boat, or by a defect in the fenders? 2nd. If the injury was caused by defect in the fender alone, was it defective originally, either in its material, or in the way in which it was fastened or secured, or did it become so by time and by the frequent striking of the boat, and might its falling have been prevented by proper examination and repairs, and by precautions to secure it from time to time?

The jury found in answer to these questions, that the injury was not caused by any negligence or want of skill on the part of the

men in the boat. That the fender was defective originally in material, and that it became more defective by time and the frequent striking of the boat, and that its falling might have been prevented had proper examination and repairs been made from time to time. They gave a verdict for the plaintiff for $4,000.

A rule *nisi* for a new trial, on the ground of misdirection, was granted on the following grounds:—

1st. In not directing the jury that the defendants were not liable for any latent or hidden defect in the fender, or for any defect by the wearing away of the fender.

2nd. In not directing the jury that the ferry having been leased, as allowed by the charter, and the lessee being bound to repair, the defendants were not liable for his negligence.

3rd. In leaving to the jury whether the fender was originally defective, there being no evidence to warrant such a question. Also that the verdict was against law and evidence.

It was contended by the defendants' counsel that a municipal corporation could not be liable in an action for negligence; but the ground principally relied on was that, having leased the ferry to McSweeney, who was bound to keep the fenders, landing, &c., in repair, the defendants were not liable for any damage caused by his negligence in not repairing. It was also contended that there was no evidence that the pile was originally defective, the evidence that there was "an old break in it," not necessarily proving this; and consequently that it was misdirection leaving that question to the jury.

1st. As to the liability of the defendants, independent of the question of the lease. There is no doubt that a municipal corporation is liable to an action for negligence, Grant corp. 501, Hill. Torts. 414, Scott *v.* The Mayor, &c., Manchester (2 H. and N. 204). The defendants in this case are authorized by the charter of St. John to establish ferries and to receive tolls for the conveyance of persons thereby; and when they did establish a ferry, and kept it running for the use of the public, it was their duty to take care that the boats, landings, and all the necessary approaches, were in such a condition as not to endanger the lives or property of the persons using it. In the Lancaster Canal Company *v.* Parnaby (11 A. and E. 223), where the company were incorporated for making and maintaining a canal to be open to the public on payment of rates, which the company were to receive for the use of the stockholders, the Court of Exchequer Chamber, in giving judgment, said: "The common law, in such a case, imposes a duty on the proprietors, not, perhaps, to repair the canal or absolutely to free it from obstructions,

but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate it without danger to their lives and property." Under the charter of St. John, the Common Council received the ferriages, tolls, &c., as trustees, for the use and benefit of the public, and not for the individual members of the corporation; but in Gibbs v. The Trustees of the Mersey Docks (3 H. and N. 164, 4 Jur. N. S. 636), and afterwards on appeal in the House of Lords (Law R. 1, H. L. 93), where the defendants were bound by the Act under which they were incorporated to apply the tolls towards the maintenance of the docks and payment of a debt contracted in making them, it was held that it made no difference in principle, in respect to their liabilities, whether they received the tolls for a beneficial or for a fiduciary purpose, that they were liable to the same responsibilities as would attach on them if they were the absolute owners, occupying and using the docks for their own profit. In that case the action was for damages to a vessel by reason of having struck a bank of mud at the entrance of the dock, as she was endeavoring to enter it, and which bank, it was alleged, the defendants negligently suffered to remain there. The rule of law established, following the case of Parnaby v. The Lancaster Canal Company (11 A. and E. 222) was, that so long as the dock was kept open for the public, it was the duty of the trustees to take reasonable care that the dock and its entrance were in such a state that those who navigated it might do so without danger; and that for breach of that duty they were liable. This case was followed by Coe v. Wise (Law R. 1 Q. B. 711), where public drainage commissioners were held liable for damages for the negligence of their servants in making a sluice, which they were bound by law to make and maintain; though they discharged their duties without reward, and the Act provided no funds to meet the demand upon them. We cannot distinguish the principle of these cases from the present one. The true test of liability is, whether the law has cast any duty on the defendants to do any act, and whether they have neglected that duty, and the plaintiff has sustained damage in consequence of that neglect, not whether they have or have not funds to pay any damages that may be recovered against them.

Then, secondly, does the lease of the ferry to McSweeney relieve the defendants from liability? It may be admitted that the relation of master and servant does not exist in this case, and therefore that the maxim *qui facit per alium facit per se, &c.*, does not apply. The ground upon which we think the defendants are liable, notwithstanding the lease, is, that the law casts upon them, as the owners of the ferry, the duty of keeping it in such a state of repair as is

necessary for the public safety, and that they cannot get rid of this liability by leasing the ferry. The covenant by the lessee to keep the ferry-boats, landings, and approaches in repair renders him liable to the corporation for neglect, but does not relieve them from their liability to the public, arising out of the ownership of the ferry. We think there may be a clear distinction between the liability of a landlord in such a case as this, and his liability in a case where damage has been caused by the negligence of his tenant, in doing or omitting to do something which the law has cast no obligation on the landlord to do. In Hole v. The Sittingbourne Railway Company (6 H. and N. 488), Pollock, C. B., says: "Where a person is authorized by Act of Parliament, or bound by contract, to do particular work, he cannot avoid responsibility by contracting with another person to do that work." And in Pickard v. Smith (10 C. Bench, N. S. 470), Williams, J., in delivering the judgment of the Court, said, that though no one could be liable for an act or breach of duty unless it was traceable to himself, or his servants in the course of their employment. and consequently if an independent contractor was employed to do a lawful act, and, in the course of the work, he or his servants committed some act of wrong or negligence, the employer was not answerable. Yet this rule was inapplicable to cases in which the contractor was entrusted with the performance of a duty incumbent on his employer and neglected its fulfilment, whereby injury was occasioned. That if the performance of a duty was omitted, the fact of the party having intrusted it to a person who also neg ected it, furnished no excuse either in good sense or law. This case is cited, and the above distinction adopted, by Blackburn, J., in delivering the opinion of the Judges before the House of Lords in the case of the Mersey Docks Trustees v. Gibbs (Law R. 1, H. L. 114), and we think the principle is quite applicable to the present case, because the keeping the ferry-landing in repair was a duty incumbent on this corporation by law. This view renders it unnecessary to consider whether the effect of the lease is to convey to McSweeney any interest in the soil of the harbor where the piles were driven, or only to give him an incorporeal right, and, as incident and necessary to the ferry, the right to use the piles. It is also unnecessary, in the view which we take of the defendants' liability, to consider whether there was evidence to leave to the jury of original defect in the fender. That question would only be material in the event of its being considered that the defendants were relieved from liability by the lease to McSweeney, and his covenant to repair.

Rule discharged.*

* Ritchie, C. J., and Weldon, J., took no part.

DOE ex dem. MCGOWAN *v.* MCCOLGAN.

JUNE 19th, 1869.

It is a sufficient defence, in an action of ejectment, to prove title out of the lessor of the plaintiff.

Where the lessor of the plaintiff derives his title from his ancestor, acquired by the Statute of Limitations, it is sufficient to prove, for the defence, that such ancestor paid rent for the *locus in quo*, while the statute was running.

Ejectment tried before ALLEN, J., at the St. John Circuit, in January last. The plaintiff proved that Michael McGowan, the father of the lessor of the plaintiff, entered into possession of the *locus in quo* in the year 1825, as tenant of Sheriff White. He paid rent for one year and continued to occupy the land until his death, in 1860. The lessor of the plaintiff proved that he was the only son of Michael McGowan. For the defence, it was proved that the defendant entered into possession in 1860, under an arrangement with the widow of McGowan, and continued to occupy the premises. John McMurtrie, one of the defendant's witnesses, testified that in July, 1849, he went, by the direction of Sheriff White, to McGowan, to tell him to come to do work in payment of rent on his farm, and that agreeably to this request, McGowan came and worked for Sheriff White. McAfee proved that in 1841, McGowan admitted to him that he had lately paid rent to Sheriff White for the premises. In 1855, Mr. Millidge, a son-in-law of Sheriff White, went, by his direction, to McGowan, and asked him to sign a lease for the land, telling him he might remain on it while he lived. McGowan refused to sign the lease, but said the property belonged to White, and would be his when he was gone. The will of Sheriff White was offered in evidence, to prove that the land in dispute was devised to Mrs. Millidge, but not admitted in consequence of the proof of execution being defective.

The learned Judge directed the jury that there was no privity between the defendant and the heirs of Sheriff White, and that as against the defendant, the lessor of the plaintiff had a right to recover, whereupon the jury found a verdict for the lessor of the plaintiff.

A. L. Palmer, Q. C., in Hilary Term last, obtained a rule *nisi* for a new trial, on the ground of misdirection.

S. R. Thomson, Q. C., shewed cause in Easter Term. The defendant here is attempting to shew title in a third party. [RITCHIE, C. J.: Why has he not a right to do that]? Because he did not claim under that party. [RITCHIE, C. J.: That is not necessary]. I contend that there was no evidence of the title of White to leave to the

jury. The possession of McGowan never was terminated. Assuming that McGowan, the father, was a tenant of White, paying rent to him, no notice to quit has been given, so that he could not be turned out of possession. Therefore the rule must be discharged, because there is a subsisting tenancy which has never been terminated, and the defendant cannot set up the right of a third party, through whom he does not claim.

A. L. Palmer, Q. C., contra. The defendant proved title out of the plaintiff, by shewing that McGowan occupied the premises, as tenant of White, and paid rent. McGowan told Millidge that he did not claim the land, but only wished to be allowed to reside on it while he lived, and that at his death it would be given up. The fact of him being in possession, as tenant, and paying rent, might be evidence of the title of his landlord, but it would not go far towards establishing his own title. The case is perfectly plain in point of law.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

The lessor of the plaintiff in this case claimed, as the heir of Michael McGowan, who died in possession of the land, in 1860. He went on the land, about the year 1825, by permission of the late Sheriff White, and occupied it, up to the time of his death, after which his widow occupied it till her death, about four years afterwards, when the defendant took possession. It appeared that Michael McGowan used to work for Sheriff White, and paid him rent for the land, in that way, for a number of years, the last payment being in 1849. About the year 1855, Mr. Millidge, a son-in-law of Sheriff White, went, by his direction, to Michael McGowan, and asked him to sign a lease for the land, telling him he might occupy it as long as he lived. McGowan refused to sign any lease, but said the property belonged to White, and would be his when he (McGowan) was gone. It was stated that the defendant was holding, by permission of Millidge, but it did not appear whether he took possession by Millidge's permission, or whether he was holding under a subsequent arrangement. Sheriff White's will was offered in evidence, to prove that the land in dispute was devised to Mrs. Millidge, but was rejected, the proof of execution being defective.

A verdict was found for the lessor of the plaintiff, under the direction of the learned Judge, who was of opinion that the defendant had shewn no privity with the heirs of Sheriff White, and that as against the defendant, the lessor of the plaintiff had a right to recover. We think there must be a new trial in this case, as the lessor of the plaintiff has not shewn any legal title to the land.

Michael McGowan was a tenant, from year to year, to White's heirs, at the time of his death. In the absence of any termination of that tenancy, if the lessor of the plaintiff had been the executor or administrator of his father, he might, and probably would, have been entitled to recover; but, as the interest of Michael McGowan, in the property, was a chattel interest, descending to his personal representative at his death, the lessor of the plaintiff, claiming as his heir, has no right to turn the present occupant out of possession.

Rule absolute.

GODARD v. THE FREDERICTON BOOM COMPANY.

JUNE 19th, 1869.

In an action for wrongful detention of timber in a boom, the plaintiff is entitled to recover damages for the loss sustained, by reason of a fall in the market, between the time the timber should have been delivered and the time it was actually delivered.

Where the jury do not appear to have assessed the damages on a wrong principle or acted under the influence of improper motives or bias, the Court will not disturb their finding even if the damages are larger than they might have been disposed to give as jurors.

This was an action tried before WELDON, J., at the St. John Circuit, to recover damages for the wrongful detention of a quantity of the plaintiff's logs in the boom of defendants, and to recover the value of certain logs which were never returned to plaintiff. The logs went into defendant's boom in the summer of 1863, and on the 10th September, plaintiff tendered the boomage to defendants and demanded them, the defendants refusing to give them up, they being claimed by a third party. On the 10th November, 1863, they went into the possession of the South Bay Boom Company, against whom the plaintiff had recovered damages for their subsequent detention. The plaintiff, besides his claim for the loss of twenty-four logs lost, at $12 each, claimed damages on fifty-one mast pieces, which he alleged to have depreciated in value during the detention, $70 each, in consequence of a fall in their market value, for a depreciation of five per cent. on the value of one thousand logs, for boomage and and towage, amounting to $175, and for interest on $3500, which he claimed to be the value of the logs. The learned Judge limited the period in which the plaintiff was entitled to recover damages for depreciation in value and interest to the two months prior to the 10th November, when the logs went into the possession of the South Bay Boom Company. The evidence in support of the Plaintiff's claim is detailed in the judgment of the Court. The jury having found a verdict for plaintiff, damages, $3410,

A rule *nisi* for a new trial was obtained in Hilary Term last on the ground of excessive damages.

S. R. Thomson, Q. C., shewed cause in Easter Term, contending that the damages were not excessive, but moderate, and much less than was proved by the evidence of plaintiff and of McLaughlin to have been sustained. When a case has been twice tried and two juries have decided on its merits the Court will pause before sending it down to a third trial. A verdict can only be set aside by reason of the damages being excessive where there was no evidence to warrant such a verdict, but that is not the case here, the evidence being amply sufficient to sustain the finding of the jury.

D. S. Kerr, Q. C., contra. The plaintiff in his opening claimed damages for loss for depreciation over the whole period when the logs were out of his possession, but why should the jury have taken the range of two seasons for depreciation when the damages must be confined to two months or one. The plaintiff's evidence on this point referred to the whole period of detention. All the evidence of damage should have been confined to this period of two months. The plaintiff did not pretend to say that during that particular season he entirely lost the sale of the masts. He should have shewed affirmatively that during that very period the depreciation took place.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.*

This case as presented to us turns solely on the question of excessive damages. The verdict was for $3,410. The plaintiff was entitled to recover damages for the detention of the timber from the day he tendered the boomage to the defendants, viz., the 10th September, 1863, till the day the defendants delivered the timber to Tuck, viz., the 10th November, 1863 On the trial the learned Judge told the jury that if on the facts they should find for the plaintiff under the direction given them (which is not now in question) then as to the damages there was the boomage in South Bay Boom by reason of the timber being placed there, and which plaintiff was compelled to pay before he could get possession, interest on the value of the logs during detention, two month's depreciation of timber during that period, and twenty-four pieces lost, estimated to be worth $12 each. There were also fifty-one mast pieces, claimed to be worth, when detained, $100 each, the sale of which was alleged to have been lost by detention. The learned Judge left to the jury

* Ritchie, C. J,, and Weldon, J.—Allen, J., having some doubts, and Fisher, J., having been counsel in the cause, took no part in this judgment.

whether such sale was lost by that detention from 10th September to 10th November; if so, and a depreciated value could only be afterwards obtained for them, he directed that such loss in their market value would be proper matter for compensation. The main question arises on this last item of damage. We think the loss incurred by the plaintiff by reason of a fall in the market occurring between the time when defendants should have delivered the property and the time when it actually was received by plaintiff, in other words, while it was wrongfully detained by defendant from him, is an element of damages to be taken into account by the jury. This case is analagous in principle to Collard v. South Eastern Railway Company, (7 H. & N. 85), and as there said, so we think here, that the damage "is a direct and immediate loss consequent on the defendants' breach of duty," and that "it must be ascertained what the goods were worth at the time they became available to plaintiffs as marketable goods, contrasted with what they would have been worth if defendants had performed their contract." See also Wilson v. Lan. and York. Railway Company, (9 C. B. N. S. 633). But it is urged that though this may be so in general, in the present case there was no evidence of any such loss to the extent found by the jury. The case no doubt rests mainly, though not wholly, on the evidence of the plaintiff himself. He says he had fifty-one mast pieces; the market value of them was $100 each between the 10th September and 10th November. The lumber was worth $20 per M. during that period, that defendants kept them from him, and prevented him selling them. He was acquainted with their value, they (the mast pieces) depreciated and were not worth more than a third after that period, and only fit to be sawed into boards, worth $30 a piece. One of them measured three thousand five hundred and the others over one thousand one hundred feet. The depreciation in not being cut that fall (speaking of the logs) would be five per cent.; the sap would be stained and the lumber manufactured from it would be injured. He says "I had to pay boomage 10 cents per M. as soon as they came into the boom; paid 25 cents per M. for towing them out of the boom. I paid $125 on five hundred M. There were one thousand logs delivered in Fredericton Boom; I only got nine hundred and seventy-six. Twenty-four logs were lost; the value of these logs was $25 per M. in September, October and November, without the masts. The twenty-four logs missing averaged about two to a M.; their value was $12 a piece, assuming there were no mast pieces among them. There was also the loss of the interest of the money." In addition to this was the following evidence. John McLaughlin said: "I saw some masts, about twenty masts, between 10th September and 10th November, 1863; they would be worth

$100 a piece. A very depreciated sale since the 10th November, and shipbuilding has been declining ever since. Saw the masts between September and November; they began to decline during that time; I do not know that there was any depreciation between 9th and 10th November; they may depreciate in a day or so by being shut in the boom." James F. Ellis, surveyor of lumber, says, "I think the depreciation between 10th September and 10th November, would depend upon the kind of logs; it would be small. I was on the logs in the South Bay Boom, they were the best I ever saw; I think the depreciation would be slight, if any, between 10th September and 10th November. I could not tell without examining them, the depreciation would be slight, but I would prefer buying them in the spring to the fall. It is not generally understood that logs depreciate any the first season; they might a little, but very slightly." John Tapley says, "We have towed out of South Bay Boom as late as 5th December. In 1863, could get logs out on the 10th November, that year. It is not safe to take them to plaintiff's mill later than November." Lewis Rivers says, "I think the logs would not sustain much injury in two months, from September to November, but would prefer new logs. John S. Gray: "There would be some deterioration in two months; could not say what, but it would not be much."

Taking plaintiff's statement we have—

Logs lost, 24, at $12,	$288
Boomage,	50
Towage,	125
	$463
500 m. at $25 - $3,500	
Interest on amount for two months - $350	350
	$813
51 masts at $100 - $5,100	
Depreciation ⅔ loss,	3,400
	$4,213

without any allowance for the depreciation of the logs, independent of the mast pieces. The plaintiff was not cross-examined as to the matter of damages, and the only evidence offered on this branch of the case by defendants was as to the depreciation of the value of the logs during the period of detention, and it is quite consistent with the amount found that the jury may have rejected the claim on this head altogether. If we could see that there had been a mistake of the principle upon which the damages should have been estimated, or that any improper motives or feelings or bias had influenced the jury, in such a case we think the Court ought to interfere; but if there

has been no disregard of law, and the case is free from those imputations, and there is nothing inconsistent with an honest exercise of judgment, we think the Court ought to pause before it sets aside the conclusion of the jury, to whom the determination of the question particularly and rightfully belongs; because where different minds might, and probably would, arrive at different results, the measure of damages may exceed what we, as judges, might possibly have been disposed to give as jurors. This is a case where the jury (a special jury) and the learned Judge reports (a very intelligent one selected from business men well acquainted with such matters) from their business position and practical knowledge were much more competent to come to a correct estimate than we feel we could possibly have done, and we cannot bring our minds to the conclusion that we ought to overrule their decision.

Rule discharged.

TOZER *v.* HUTCHISON.

JUNE 19, 1869.

Plaintiff was engaged by defendant for two years as clerk, and shortly afterwards entered into partnership with other parties for the purpose of carrying on the same kind of business as his employer. Held, That this was such a breach of duty as would justify his dismissal.

Where on the cross-examination of plaintiff, the defendant's counsel examined him as to the time he entered into a partnership, and his interest in it, the plaintiff was held to be entitled to go into the contents of the whole agreement, although it appeared that there were written articles.

An employer who dismisses his servant on one ground may justify his dismissal on another ground which existed, but of which he was not aware at the time.

This was an action of *assumpsit* tried before ALLEN, J., at the last Northumberland Circuit, to recover the amount of two years' salary as clerk for defendant, at the rate of $600 a year, and interest, It appeared that plaintiff had been engaged by defendant at the above rate for a term of two years, to take the place of defendant's son as book-keeper and confidential clerk, the said salary to be in lieu of all perquisites. Defendant was engaged in shipbuilding and carrying on a large mercantile business, and on the 13th November, 1865, when plaintiff had been some seven months in his employment, he dismissed him from his service. The defence was that plaintiff, by entering into partnership with other parties, for the purpose of carrying on shipbuilding, had violated his implied contract to give his undivided attention to defendant's business, and that this was a good ground of dismissal. The agreement of partnership which

was between plaintiff and two other parties named Cassidy and Carrol, was in writing, dated October, 1865, the partnership to continue five years from date, and was in substance that the three parties named were to become partners for the purpose of carrying on shipbuilding, and to devote their whole time to the joint business. Cassidy, one of the partners, testified that this agreement, though dated in October, was not executed until the 21st November, eight days after plaintiff was dismissed from defendant's employment, but there was evidence to shew that the partnership existed for some time previous to the dismissal. Prior to the agreement being produced, defendant's counsel, in cross-examination, asked plaintiff as to the time when he entered into the partnership, and as to his interest in it. On re-examination the plaintiff's counsel claimed the right to go into the whole agreement between the partners, although it then appeared that there were written articles of partnership, which he did subject to objection, and the plaintiff gave evidence that notwithstanding the partnership he was still to continue in defendant's employment, and that he was to give his salary to the partnership in lieu of his services. He admitted to defendant the morning he was dismissed that he had entered into a partnership. Evidence was given on behalf of defendant to shew that plaintiff had been absent from the defendant's store at times during the proper hours of business, this being one of the reasons given by defendant for dismissing him, and that the posting of the books, which defendant alleges was part of plaintiff's duty, was two months behind; but the absence was denied by plaintiff. After plaintiff's dismissal the defendant sent him what professed to be an account of the amounts plaintiff had received on account of his salary, amounting to £87 1s. 2d., and $2 as a payment in full to the date of dismissal. This account was not in defendant's name, but in the name of Gilmor, Rankine & Co., and was put in by way of set-off. After receiving the account the defendant replied as follows:—

CHATHAM, January 29th, 1866.

HON. R. HUTCHISON.

SIR,—I received your account, also two dollars, which I will credit you with. I wish you to understand that I do not recognize this as any settlement, and shall still hold you to our first agreement.

Yours, &c.,

E. C. TOZER.

The learned Judge told the jury that the mere fact of the plaintiff having entered into the partnership was not necessarily a violation of his agreement with defendant unless it interfered with his duty in defendant's employment. That if plaintiff neglected defendant's business he had a right to dismiss him, but that his merely investing his salary in the business with his partners was no breach of duty.

That the account of Gilmor, Rankine & Co. against plaintiff, was no set-off to his claim, the agreement having been with Hutchison alone and that the plaintiff was entitled to interest, if they found for him. A verdict having been found for plaintiff for the full amount of his claim,

Needham, in Michaelmas Term, obtained a rule *nisi* for a new trial on the grounds of misdirection and improper admission of parol evidence of the terms of the partnership.

A. L. Palmer, Q. C., shewed cause in Hilary Term. The evidence of the terms of partnership was totally immaterial if the deed of partnership did not exist at the time defendant discharged plaintiff. It was dated prior to that time, but our evidence shewed that it was not executed until afterwards and we had a right to shew this. Bustin *v.* Donelly, (3 Kerr, 71) is conclusive as this point. [ALLEN, J.: The question is was there not an existing partnership in October, and would that affect the right of plaintiff to recover his wages]? I contend it would not while the partnership did not interfere with the discharge of his duties to his employer. Though the deed is an estoppel between the parties to it, it is not so as regards third parties, for there they could give evidence to vary it. Carpenter *v.* Buller, (8 M. & W. 209). The same principle was held in Bishop *v.* Robinson (*Ante* 68). Prior to the discharge, there was only an oral agreement, and the plaintiff cannot be estopped from shewing what its terms were. When the defendant attempts to show that by the agreement, we admit a matter relative to the beginning of the partnership, which is not correct, we have a right to give evidence to contradict it. I contend also that if a party hires with another, and afterwards makes an agreement of partnership agreeing to devote all his time to it, that will not justify his discharge unless he has neglected his duty, for he has a right to break the partnership agreement, which is inconsistent with his agreement with his employer, but here the defence proved the existence of the partnership prior to the date of the agreement, and surely I had a right to examine the witness as to its terms. The direction of the learned Judge as to the effect of the partnership was right: if a man agrees to do a certain duty and performs it, the partnership will not affect his right to be paid, or authorize his discharge; so, too, with reference to the set-off: an account from Gilmor, Rankine & Company was no set-off to plaintiff's claim against defendant, and the mere admission of the receipt of the account is no acknowledgment that it was correct.

S. R. Thomson, Q. C., and *Needham*, contra. The learned Judge's

ruling was wrong with reference to the account, for the account was enclosed from defendant. The defendant's letter, in reply, is a tacit admission that the account was correct, and if not an estoppel was at least a matter to be left to the jury. We do not contend that evidence could not be given to contradict the agreement as to third parties, but by the terms of the agreement which plaintiff would then be estopped from denying, he would have been liable to an action by his partners for not giving his time to the partnership as expressed by its terms. The main question is as to the plaintiff's right to enter into the partnership. We contend that the plaintiff having entered defendant's employment as confidential clerk for a certain salary in lieu of all services, was bound to give all his time to his employer's business, and had no right to enter into any other pursuit which distracted his mind from it. But besides this, the plaintiff actually goes into partnership for the purpose of following the same line of business in which his employer was engaged, and sets up, in fact, a rival business. Can it be contended that this was not a good ground of dismissal?

Cur. adv. vult.

ALLEN, J., now delivered the judgment of the Court.

We think the parol evidence of the terms of partnership was admissible in this case, in consequence of the course pursued by the defendant's counsel, on the cross-examination of the plaintiff, who was asked when the partnership was entered into, and what his interest in it was, though it appeared at that time that there written articles of partnership. The defendant having given the evidence, we think the plaintiff's counsel was entitled, on re-examination, to go into the whole agreement. Whether he would have been entitled to give this evidence, and thereby shew that the terms of partnership were different from those expressed in the written agreement between the plaintiff and his co-partners, we need not now determine. The principal question in this case is, whether the jury were properly directed upon the defendant's right to dismiss the plaintiff. We all agree, for reasons hereafter stated, that there ought to be a new trial. One of the members of the Court is of opinion that it was a question for the jury to determine whether the fact of the plaintiff's entering into the partnership was such a breach of duty as justified the defendant in dismissing him. A majority of us think that the partnership having been admitted by the plaintiff, there was no fact to be left to the jury; that it was a question of law, whether the entering into the partnership was a ground of dismissal, and that the jury should have been directed that this was such a breach of his implied agreement to devote his time and attention to the partnership of his

employer, as justified the defendant in dismissing him. A person who enters into the service of another undertakes to bestow the same care, attention and dilligence as if the business were his own. This the plaintiff could not do while he had an interest as partner in a business of the same description as that in which his employer was engaged. There would necessarily be a conflict between his duty and his interest. It was inconsistent with his duty as clerk to defendant and destructive of the confidence which must be reposed in a person employed as the plaintiff was, by enabling him to make use in his own business of the knowledge and information which he obtained as the confidential clerk and agent of the defendant.

In most of the cases where questions of this kind have arisen, it has been left to the jury to determine certain facts, with a direction from the Judge as to what misconduct would justify the master in dismissing the servant. Aitkin v. Acton, (4 C. & P. 208): Callo v. Bronuker, (4 C. & P. 518). In other cases, as in Ridgeway v. the Hungerford Market Company, (3 A & E. 171); Read v. Dunsmore, (9 C. & P. 588). Amor v. Fearon, (9 A. & E. 548), Mercer v. Whall, (5 Q. B. 44), it seems to have been left more broadly to the jury whether the master was justified in dismissing the servant. In Horton v. McMertry, (5 H. & N. 667), it was left to the jury to say whether the conduct of the plaintiff was such as justified the defendant in discharging him, telling them that as far as it was a matter of law no servant had a right to do as the plaintiff had done; and that the defendant had a perfect right to discharge him. Pollock, C. B., in that case says, that where it is in any degree doubtful whether the question is one for the jury or the Court, the safest way is for the Judge to express his opinion upon it, as a matter of law. In Dolby v. Kinnear, (1 Kerr, 480), the right to dismiss seems to have been treated as a question of law, and in Smith v. Thompson, (8 C. B. 52), where the plaintiff was dismissed for an alleged wrongful appropriation of money intrusted by him to the defendant, Creswell, J., says, "It was for the jury to say whether or not there was a wilful misappropriation of the money; and for the Judge to say whether such misappropriation, when proved, would justify the plaintiff's discharge. Whether or not, under the circumstances of this case, it was entirely a question for the Judge, whether the plaintiff entering into the partnership justified his dismissal, we think the other grounds of alleged misconduct should have been left to the jury, and that they should have been asked to find whether the plaintiff was absent from the defendant's store during the proper hours of business, and whether the defendant's books were not posted in consequence of his neglect, and if they found in the affirmative, that they should have been directed as to the consequences of such

neglect. The plaintiff's absence from the store was one of the grounds of complaint made against him by the defendant when he discharged him, and if another ground of dismissal existed, the defendant had a right to avail himself of it at the trial, though he was not aware of the existence of it at the time; because if good ground of dismissal existed, the plaintiff suffered no wrong from not having been accused of it. Ridgeway *v.* Hungerford Market Company (3 A. & E. 171); Mercer *v.* Whall (5 Q. B. 44); Spotswood *v.* Barron (5 Ex. 110). As to the right to set-off the £87 1s. 2d., we think it could not be done, as the contract was with the defendant alone, which distinguishes this case from Stockwood *v.* Dunn (3 Q. B. 822). It may be a question, however, whether the plaintiff's letter to defendant acknowledging the receipt of the account, does not amount to an admission of payment on account to the extent of £87 1s. 2d. It is not necessary, however, to determine either of these questions, as there must be a new trial on the other grounds.

Rule absolute for new trial.*

MURRAY *v.* GILBERT.

JUNE 19th, 1869.

Plaintiff, by a written agreement, sold to defendant for £45, payable part that autumn and balance in one year, the logs on his and his son's land, with the right to cut, for five years. Defendant during the following winter cut and hauled off all the trees suitable for lumber. In the mean time plaintiff conveyed to his brother, who brought an action of trespass against defendant, for cutting on the land and recovered damages.

Held, That the plaintiff was entitled to recover the amount, defendant having bound himself to pay on a certain day, and having got the logs.

2 That the trees being severed, became chattels, and plaintiff's claim being merely a money demand might be recovered on the common counts.

Assumpsit for goods sold and delivered tried before WELDON, J., at the last Westmorland Circuit. The plaintiff relied on the common counts. The plaintiff gave in evidence the following agreement, made by him with defendant.

WILLIAM J. GILBERT, ESQ.

SIR,—I will sell you what logs there is on my land, and on my son's land on the Shediac River, for £45 cash, £8 or £10 payable this fall, and the balance in one year. Also I will give you the right for five years, to cut the said lumber, not to include my brother William's share.

ALLAN MURRAY.

Shediac, 18th July, 1863.

I agree to the above. W. J. GILBERT.

* Ritchie, C. J., took no part.

The defendant, during the following winter, cut and hauled off the land all the trees suitable for lumber. While he was doing so the plaintiff conveyed the land to his brother, and William Murray, who claimed under plaintiff's son, afterwards brought an action of trespass against defendant, for cutting on the land belonging to him, and recovered damages. When the £45 became payable under the agreement, defendant refused to pay it, whereupon the present action was brought: an action is now pending, brought against plaintiff by defendant, for breach of the agreement.

The learned Judge directed the jury that the plaintiff could not recover on the common counts. The jury having found for defendant,

D. L. Hanington, in Hilary Term last, obtained a rule *nisi* for a new trial on the ground of misdirection. He contended that the contract was practically fulfilled, and defendants could recover on the common counts.

A. L. Palmer, Q. C., shewed cause in Easter Term. Lee *v.* Risden (7 Taunt. 188) shews that the price of house fixtures cannot be recovered under a declaration for goods sold and delivered. It is quite clear that the contract cannot be described as for goods sold and delivered, for this term is not applicable to real estate. [RITCHIE, C. J.: mentioned Knowles *v.* Michel, (13 East 250) a case directly in point].

D. L. Hanington, contra. The doctrine which governs this case is laid down in Cooke *v.* Munstone, (1 N. R. 355), by Chief Justice Mansfield. He says a party may recover on a general count, if the case be such that supposing there had been no special contract, he might still have recovered for money paid, or for work and labor done. Burn *v.* Miller, (4 Taunt. 745), is to the same effect. In Sheldon *v.* Cox, (3 B. & C., 420), it was held that as nothing but the payment of money remained to be done between the parties, the plaintiff might recover on the common counts. This is precisely the case here. As the party has received the full benefit of the contract, and nothing remains to be done on his part but pay the money, I contend that we are entitled to recover on the common counts.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

This was an action for goods sold and delivered, to recover the value of logs cut on the plaintiff's land and on his son's land, £45.

The plaintiff gave in evidence the following agreement between himself and the defendant:

WILLIAM J. GILBERT, ESQ.

SIR,—I will sell you what logs there is on my land, and on my son's land, on the Shediac River, for £45 cash, £8 or £10 payable this fall and the balance in one year. Also, I will give you the right for five years to cut the said lumber, not to include my brother William's share.

Shediac, 18th July, 1863. ALLAN MURRAY.

I agree to the above. W. J. GILBERT.

Under this agreement the defendant went upon the land during the following autumn and winter, and cut and hauled off all the trees that were suitable for lumber. While he was cutting the logs, the plaintiff conveyed the land to his brother. An action of trespass was afterwards brought against the defendant by William Murray, who claimed under the plaintiff's son, for cutting on that part of the land belonging to him, and recovered damages. The present action was brought after the £45 became payable under the agreement. The defendant has brought an action against the plaintiff to recover damages for breach of the agreement, which action is now pending.

The question is whether the plaintiff can recover the £45 on the common counts, or whether he must declare specially. The case of Bragg v. Cole, (6 J. B. Moore, 114), is very much in point. There the defendant agreed, in March, to purchase ten ash trees growing on the plaintiff's land, to be cut down and taken away by defendant, before the 1st of December then next: he afterwards cut down and carried away seven of the trees, but refused to pay for them until he got the remainder; and it was held that the plaintiff was entitled to recover for the trees taken away, on the common count for trees sold and delivered, and that the agreement was for the sale of a chattel interest only, and not for any interest in lands.

It is not necessary to determine whether the agreement in the present case was for the sale of an interest in lands—whether the defendant had any right to the possession of the land, or a mere easement to enter upon it for the purpose of cutting and taking away the trees The cases on this subject are not altogether reconcileable. See Parker v. Staniland, (11 East, 362); Scorell v. Boxall, (1 Y. &. J. 396); Smith v. Surman, (9 B. & C. 561). The defendant bound himself to pay the £45 on a certain day, which was to happen before the time allowed for taking off the lumber, and he was liable to pay although he might not have cut a tree at that time, unless perhaps there had been an entire failure of consideration, as if he had been prevented by the plaintiff or any one claiming under him from cutting. But here, the defendant has cut and taken away a considerable quantity of trees from the land, of which he has had

the benefit, and for which he ought to pay. If he has sustained damages by the act of the plaintiff in conveying away the land, and thereby preventing him from getting the entire benefit which he expected during the remainder of the five years, his remedy is by an action on the agreement, which course he has already adopted. See Spiller v. Westlake, (2 B. & Ad. 155); Stephens v. Wilkinson, (2 B. & Ad. 320). The rule laid down in Pordage v. Cole, (1 Saund. 320 b), and Mattock v. Kinglake, (10 A. & E. 50), applies to this case. Then, as to the right to maintain the action on the common counts. The plaintiff's claim was simply a money demand; the trees, by being severed from the freehold, had become chattels, and had been received by the defendant; and there was no further act to be done by the plaintiff before his right to the money became complete; we do not, therefore, see what necessity there was for declaring specially on the agreement; or, if he had done so, what averments the plaintiff would have been bound to make in his declaration more than he has made substantially in this case. The defendant is not deprived, by this mode of pleading, of any defence which would have been open to him on a special count. For these reasons we think the rule should be made absolute.

Rule absolute.

THE QUEEN v. CHANDLER.

In re HAZLETON

An Act which provides for the examination of a debtor before a Judge, as to his ability to pay his debts, and for his discharge from gaol, or the limits as to the suit for which he was confined, where his inability to pay is shewn, and where he has made no fraudulent transfer or undue preference, is an Insolvent Act which the Legislature of New Brunswick has no power to pass since the British North America Act, 1867, came into force, and the assent of the Governor General will not make it valid.

Where an Act of the Local Legislature conflicts with an Imperial Statute, the Court will pronounce upon its validity.

S. R. Thomson, Q. C., in Hilary Term last, obtained on affidavits a rule *nisi* for a prohibition to restrain James W. Chandler, Esq., one of the County Court Judges, from acting under an Act passed by the Local Legislature of New Brunswick, on the 23rd of March, 1868, entitled "An Act in amendment of Chapter 124, Title 34, of the Revised Statutes of Insolvent Confined Debtors," on the authority of which he was proceeding with an examination of Hazleton, an insolvent debtor confined in the common gaol of St. John, on a *ca. sa.* issued out of the Supreme Court. This Act provides that any person confined in gaol or on the limits in any civil suit may apply for his discharge to a Judge of the County Court, who may order the

sheriff to bring the debtor before him for examination, which order the sheriff shall obey without being liable to an action for escape or otherwise. In pursuance of which order it is provided that the debtor and witnesses shall be examined, and if on such examination it shall appear to the satisfaction of the Judge that the debtor has no property except such as is by law excepted from levy under execution, and that since he was served with the first process in the suit in which said application was made he had not directly or indirectly transferred any property, real or personal, intending to defraud the person at whose suit he is confined, or given any undue preference, such Judge shall, by order in writing, discharge the debtor from confinement as to that suit. The Act also authorizes the appointment of commissioners to exercise the powers of County Court Judges, repeals § 1, 5, 8, 10 and 18 of cap. 124, title 36, of the Rev. Statutes, 23 Victoria, cap. 28, and 26 Victoria, cap. 10. The grounds of the application were that the said Act was of no force or effect, it being an Act relating to Insolvency, and therefore such an Act as the Local Legislature of New Brunswick had no right to pass, insolvency being one of the subjects assigned by the British North America Act to the exclusive legislative authority of the Parliament of Canada. And that the Legislature of New Brunswick had no power to alter or vary in any way the law relating to insolvency, as it stood at the time the British North America Act came in force.

I. Allen Jack shewed cause in Easter Term. Formerly this Court had no power to say that an Act of the Legislature to which the Lieutenant Governor had given his assent, was not in accordance with the Royal Instructions. Rex. *v.* Kerr. (Bert. 367). [RITCHIE, C. J.: That case does not apply here, we are now only called upon to elect betwen two Statutes. Where an Act of the British Parliament conflicts with our own the latter must give way]. I contend that would only be where the interests of the people of the United Kingdom were in question, and not to a Colonial Act. Here the Provincial Act has been approved by the Governor General and by the Minister of Justice, the legal adviser of the Government, whose duty it is to advise upon the proceedings and the Acts of the Legislatures of the Provinces. [RITCHIE, C. J.: You surely do not contend that the assent of the Governor General would make an Act law, where there was no right to legislate]. An Act approved by the sole representative of Her Majesty under the advice of the legal adviser of the Crown, must have the force of law until disallowed by some higher authority or repealed. It is the duty of the Court to give effect to the Acts of the Legislature where they do not stultify themselves, and especially in this case where the Government of Canada

have put a construction upon the British North America Act and regarded our Provincial Act as not conflicting with it. I contend, also, that this is not an Insolvent Act and therefore does not conflict with the British North America Act. The fact of the word "Insolvency" being used in the title does not show it to be so, for the title is no part of the Act. An insolvent law simply provides for the distribution of the property and effects of a debtor, and his release from future liability. Dwarris on Stat. p. 754, says an Insolvent Act should be construed strictly, "because it gives away the property of the subject." It is clear that the present Act, which merely discharges the debtor from confinement as to the suit, will not come within either of those definitions. [RITCHIE, C. J.: Is not this man now in gaol an insolvent debtor: and is it not by virtue of his insolvency that he seeks relief under this Act]? The British North America Act, § 29, sub-sec. 14, makes procedure in civil matters in all Provincial Courts a matter within the exclusive control of the Local Legislatures. The arrest and discharge of debtors are clearly proceedings in civil matters, and controlled by the Courts where the proceedings are had; neither the arrest of a person nor his discharge relate to insolvency.

S. R. Thomson, Q. C., contra. This case is too clear for argument, it is absurd to say that the assent of the Governor General can give effect to an unconstitutional Act or create a jurisdiction. The words of the British North America Act are plain. This is clearly an Insolvent Act and the Local Legislature in passing it have gone beyond the limits of their legislative power, and it now only remains for the Court to interpose its authority.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

This was an application for a prohibition to James W. Chandler, Esq., one of the County Court Judges, to prohibit and control him from acting under an Act passed by the Local Legislature of this Province, on the 23rd of March, 1868, entituled, "An Act in amendment of chapter 124, title 34, of the Revised Statues of Insolvent Confined Debtors," on the authority of which he was proceeding with an examination of an insolvent debtor confined in the common gaol of the city and county of St. John, on a *ca. sa.* issued out of the Supreme Court on a judgment of the Court on the ground that such Act was of no force or effect, and consequently the discharge of an insolvent confined debtor was a matter over which he, as a County Court Judge, had no jurisdiction. The contention on the part of the applicant is that the subject dealt with by the Local Legislature in

that Act, is, by the British North America Act, 1867, exclusively assigned to the Parliament of Canada and comes within one of the classes of subjects, viz., bankruptcy and insolvency, to which the exclusive legislative authority of the Parliament of Canada extends, and so it was *ultra vires* of the Local Legislature to repeal or in any way alter the law as it stood at the time of the coming into operation of the British North America Act, by passing any binding law in a matter so exclusively belonging to the Parliament. The British North America Act, 1867, which federally united into one Dominion, under the Crown of Great Britian and Ireland, the Provinces of Canada, Nova Scotia and New Brnnswick, after reciting that whereas on the establishment of the union by the authority of Parliament it was expedient not only that the constitution of the legislative authority in the Dominion be provided for, but also that the nature of the Executive Government therein be declared, and after enacting by sec. 17 that there should be one Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons, declared by sec. 88 that the constitution of the Legislature of each of the Provinces of Nova Scotia and New Brunswick shall, *subject to the provisions of this Act,* continue as it exists at the union until altered under the authority of this Act. In a subsequent portion of the Act the powers of Parliament and of the Provincial Legislatures were declared and defined under head 6, entitled Distribution of Legislative Powers of Parliament. By sec. 91 it is declared that, *notwithstanding anything in this Act,* "the exclusive legislative authority of the Parliament of Canada is extended to all matters coming within the classes of subjects next thereinafter enumerated, of which No. 21 is Bankruptcy and Insoluency." And after enumeration of all the classes of subjects thus exclusively assigned to the Parliament of Canada, it is at the end of the enumeration enacted that any matter coming within any of the classes of subjects enumerated in this section, shall not be deemed to come within the class of matters of a local or private nature, comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces. Thus, the exclusive right to legislate on the subjects enumerated is affirmatively vested in general terms, as all matters not coming within the class of subjects assigned exclusively to the Legislatures of the Provinces, and for greater certainty but not so as to restrict the generality of such terms, the exclusive right is specifically extended in the enumeration of the subjects, and finally, by unequivocal words, it is declared that any matter coming within any of the enumerated classes of subjects shall not be deemed to come within the class of matters assigned exclusively to the Legislatures of the Provinces.

It is difficult to conceive how the Imperial Parliament, in the distribution of legislative power, could have more clearly or more strongly secured, to the respective legislative bodies, the legislative jurisdiction they were respectively exclusively to exercise. We have now to see whether the Act complained of deals with a subject exclusively delegated to the Parliament of Canada. In construing an Act of Parliament, as in construing a deed or a contract, we must read the words in their ordinary sense, and not depart from it unless it is perfectly clear from the context that a different sense ought to be put on them, *Per* Pollock, C. B., in Caine *v.* Horsfall (1 Exch. 522). There is certainly nothing in the British North American Act to shew that the word insolvency is used in any other than the ordinary sense. "Insolvency," the Dictionary (Imperial) tells us, means "inability of a person to pay all his debts, or the state of wanting property sufficient for such payment. Insolvency is a term in mercantile law applied to designate the condition of all persons unable to pay their debts according to the ordinary usage of trade." The legal meaning of the term insolvency has been judicially declared in numerous cases. Thus, in Bayley *v.* Schofield (1 M. & G. 338), Bayley, J., says the term insolvency "means that a trader is not able to keep his general days of payment." And in Biddlecombe *v.* Bond (4 A. & E. 332), where the expression in an agreement was, shall have become bankrupt or insolvent, being insolvent was held to mean general inability to pay debts, and did not signify taking the benefit of the Insolvent Debtors Act, though the word occurred in company with bankrupt, unless the context so restrained it. So in Parker *v.* Gassage (2 C. M. & R. 617), where by the agreement "bankruptcy or insolvency" was to terminate the contract, Parke, B., says: "The ordinary import of the word insolvency is an incapability of paying the party's just debts; the context may shew it used in a different sense," and on the counsel *arguendo* saying that the same argument might shew that the word bankrupt was used in the natural sense, Lord Abinger, C. B., says: "The natural sense of that word is a man who has been bankrupt according to law, though it is metaphorically used to denote an insolvent person. The word insolvency is added here to enlarge the sense." Bankrupt laws are intended to secure the application of the effects of the debtor to the payment of his debts, and then to release him from the weight of them. Bankruptcy originally, in the English law, was applicable only to traders or persons who got their livelihood by buying or selling for gain, and did certain acts which afforded evidence of an intention to avoid payment of their debts, but modern legislation in England has enlarged the description of persons subject to the bankrupt laws. The insolvent law differed from the bankrupt system, it not being confined in its

operation to any particular class, but being applicable to the whole community, and considered in its origin in England, is comparatively of modern introduction. For though provisions were made in England for the relief of persons in gaol by 32 Geo. II., cap. 28 (Lords Act) and 48 Geo. III., cap. 123, the 53 Geo. III., cap. 102 (1813), called Lord Redesdale's Act, was the first that established a general system for the relief of insolvent debtors. Numerous acts have since been passed, and finally, by 22 & 25 Vict., cap. 131, sec. 1, the jurisdiction, &c., exercised by the Courts then existing for the relief of insolvent debtors, was transferred to and vested in the Court of Bankruptcy. The distinction between insolvent and bankrupt laws has been more discussed in the neighboring republic, where, while the power of passing bankrupt laws is conferred on the Legislature of the union, the power of enacting insolvent laws is confined to the individual states. In Sturgess v. Crowningshield (4 Wheat, 122) the Chief Justice says: "The insolvent laws of most of the states only discharge the person of the debtor, and leave his obligation to pay out of his future acquisitions in full force;" and Chancellor Kent, in speaking of the distinction between bankrupt and insolvent laws, says: "There is a marked difference in general between bankrupt and insolvent laws, for while the bankrupt may be discharged from his debts the insolvent debtor is usually only discharged from imprisonment. But the line of partition between bankrupt and insolvent laws is not so distinctly marked as to enable any person to say, with positive precision, what belongs to the one and not to the other class of laws. It is difficult to discriminate with accuracy between bankrupt and insolvent laws, and therefore a bankrupt law may contain those regulations which are generally found in insolvent laws, and an insolvent law may contain those which are common to a bankrupt law." The distinction was of importance in the United States, because, as before observed (according to Kent, 2 vol., 570), the Legislature of the union possesses the power of enacting bankrupt laws, and those of the states the exclusive power of enacting insolvent laws. In this Dominion the wisdom of Parliament has entirely relieved us from any difficulty of a similar character that might arise between Parliament and the Local Legislatures, by placing the power to legislate, on both bankruptcy and insolvency, exclusively in Parliament. Mr. Stephens, in discussing the title insolvency, after referring to the statutes that have been passed for the relief of insolvent debtors, says: "The particulars of the system so established it is our purpose in what follows to explain; its effects, in the meantime, may be briefly stated thus, that it takes from the plaintiff altogether the power of prolonging at his own pleasure the period of the defendant's durance, and enables the latter immediately on his imprison-

ment to petition for his discharge from it, upon consideration of his estate being transferred for the benefit of his creditors in general, and to obtain that discharge, unless a case of fraud, malicious injury or other misconduct be established, as soon as the forms of proceeding connected with the surrender can be satisfied.

We have always in this Province had laws of this character, at any rate since the 31 Geo. III., when the first law in the nature of an Insolvent Act was passed, intituled "An Act for the support and relief of Confined Debtors." This Act having expired was revived and continued by the 36 Geo. III., cap. 3, which Act being near expiring, and the support and relief intended thereby having been found expedient and necessary, the 41 Geo. III., cap. 5, was passed, whereby prisoners for debts not exceeding £200, unable to support themselves, might, after fourteen days confinement, apply to a Judge of the Supreme Court, for a weekly support and maintenance; and the Judge after notice to the creditor was to examine the debtor or witnesses on oath, and if the debtor was found utterly unable to support himself, the Judge was to order the creditor to pay the debtor a weekly sum for his support; in default of payment the debtor to be discharged with a proviso that nothing done under the Act was to prevent the creditor from prosecuting his suit against the estate and effects of the debtor. The 10 and 11 Geo. IV. repealed all Acts in force for the relief and support of insolvent confined debtors, and made other and more effective provisions in lieu thereof. This was amended by the 1 Wm. IV., cap. 43, which was continued by 2 Wm. IV., cap. 13, amended by the 3 Wm. IV., cap. 18, continued by 4 Wm. IV., cap. 37, and repealed by the 6th Wm. IV., cap. 41, entitled "An Act relating to Insolvent Confined Debtors." The Act, in addition to provisions of a character similar to those of the 4 Geo. III., cap. 5, contained clauses under which prisoners not strictly entitled to the benefit of the Act, after one year, might apply to the Supreme Court for relief, and if it should appear that he had no property to satisfy the debt or support himself, the Court might in its discretion order either maintenance or discharge, and after receipt of weekly allowance for one year the debtor to be discharged from confinement, preserving to the creditor his remedy against the goods and lands. This Act contained a variety of other provisions not necessary to be noticed, except perhaps sec. 11, by which confined debtors possessed of property might offer the same to the confining creditor, and if he refused to take it or the proceeds, the debtor might assign or pay over the same to any other *bona fide* creditor, after which the debtor might have the benefit of the Act. In 1844 the 7 Vict., cap. 32, was passed, entitled "An Act to afford relief to persons unfortunate in business in certain cases," after re-

citing that "whereas it is deemed expedient to make some further provision for the relief of insolvent debtors, and for enabling them to make arrangements with their creditor by which they may obtain a discharge from the debts," enacted that any debtor or joint debtors finding himself or themselves unable to meet his or their engagements, might make application by petition to the Master of the Rolls, for an order for a public meeting of his creditors, and fuller provisions for enabling the debtor to offer a composition to his creditors, and enabling him, under certain circumstances, to obtain a discharge from his liabilities. This Act, which was more in the nature of a Bankrupt than an Insolvent Act, was amended (1845) by 8 Vict., cap. 94, and repealed by 9 Vict., cap. 58, and so the law stood with trifling amendments until the Revised Statutes, 17 Vict., which by title 34, cap. 124, of Insolvent Confined Debtors, substantially re-enacted similar provisions. In 1858, by 21 Vict., cap. 17, an Act was passed to amend the law for the relief of insolvent debtors, but which was really more in the nature of a Bankrupt Act, by which various provisions were made whereby any debtor owing debts to the amount of £100 or upwards, might apply to the Clerk of the Peace, who should call a meeting of the creditors and enable the debtor to offer composition which, if not accepted, authorized assignees to be chosen and the property of the debtor at the time of the notice of calling the meeting to be dealt with by assignees, and enabling the debtor to apply for discharge from all his debts after composition or assignment. This Act was repealed, except as to proceedings already commenced by 22 Vict., cap. 16, and the 11th sec. of cap. 124, title 34, of Insolvent Confined Debtors, was amended by 22 Vict., cap. 17, and sec. 1, by 23 Vict., cap. 28, and by 26 Vict., cap. 10, whereby any person confined in gaol, or on the limits for six months, might apply to a Judge of the Supreme Court, who, on being satisfied the debtor had no property or means of support, and that he had applied for weekly support without success, the Judge might in his discretion order either maintenance or discharge, the decision of the Judge to be final, and sec. 9 of cap. 124, title 34, was repealed. By 30 Vict., cap. 10, (County Court Act) sec. 32, the several County Courts, and the respective Judges thereof shall have and exercise all the powers and authority vested in the Supreme Court or the Judges thereof respectively, by cap. 124, title 34 of the Revised Statutes of Insolvent Confined Debtors, and of cap. 125, title 34, of the Revised Statutes of Absconding, Concealed, and Absent Debtors, and also of an Act made and passed in the 26th year of the reign of her present Majesty Queen Victoria, in cap. 10, entitled "An Act to amend cap. 124, title 34, of the Revised Statutes of Insolvent Confined Debtors, and of any other Act or Acts in

amendment thereof." This is a brief reference to the laws in the nature of insolvent laws passed from time to time in this Province, and conveys a general idea of the state of the law in force on the 1st July, 1867, when the British North American Act came into operation. If ever Acts were passed relating to insolvency, these (except, perhaps, the repealed Acts of 21 Vict., cap. 17, and 7 Vict., cap. 32), assuredly are peculiarly of that character. They are based solely on the utter inability of the debtor to pay his debts or support himself, and being so insolvent in the full, ordinary and legal sense of that term they deal with his insolvency and provide specially and primarily for his personal discharge, and incidentally for the disposition of any property he may possess, it being, we think, very evident that the Legislature contemplated that as those for whose benefit the Act was passed were in actual custody the great bulk of them were utterly insolvent, with no available means for the discharge of their obligations or even for their personal support in custody, and the system thus established comes peculiarly within the distinction pointed out by Chancellor Kent in discriminating between bankrupt and insolvent laws, and seems to be entirely analogous to the insolvent laws of both England and the United States. On the 23rd March, 1868, the Provincial Legislature of this Province passed an Act, entitled "An Act in amendment of cap. 124, title 34, of the Revised Statutes of Insolvent Confined Debtors:" the Act under which Judge Chandler is acting, and from proceedings under which we are now asked to prohibit him. By this Act it is provided that any person confined in gaol or on the limits, in any civil suit, may apply for his discharge to a Judge of the County Court, who may order the sheriff to bring the debtor before him for examination, which order the sheriff shall obey without being liable to an action for escape or otherwise. In pursuance of which order it is provided that the debtor and witnesses may be examined, and if on said examination it shall appear to the satisfaction of the Judge that the debtor has no property except such as is by law excepted from levy under execution, and that since he was served with the first process in the suit in which said application was made, he had not, directly or indirectly, transferred any property, real or personal, intending to defraud the person at whose suit he is confined or given any undue preference, such Judge shall by order in writing discharge the debtor from confinement as to that suit. It then authorizes the Governor in Council to appoint commissioners to exercise the powers of Judges of the County Court, and repeals 1, 5, 8, 10, and 18 sections of cap. 124, title 34, of the Revised Statutes, also 23 Vict., cap. 28, entitled "An Act to amend the law relating to Insolvent Confined Debtors," and also 26 Vict., cap. 10, entitled "An Act to amend cap.

124, title 34, of the Revised Statutes of Insolvent Confined Debtors. But it is declared that all the provisions of cap. 124 of the Revised Statutes, and of any Acts in amendment thereof or relating thereto, except as therein repealed or is inconsistent therewith, shall be and was thereby made to be in force in respect to the provisions of this Act. That branch of the insolvent system which the Local Legislature has attempted to alter is, it is true, exclusively applicable to insolvent confined debtors; but it is not the less a matter relating to insolvency, and we are at a loss to understand how it can be argued that it is not a matter coming within that class of subjects, viz: Bankruptcy and Insolvency, enumerated in the British North America Act as assigned exclusively to the Parliament of Canada. It has been argued that notwithstanding it may be so within that Statute, the Act of the Local Legislature having been passed by the House of Assembly and Council, assented to by the Lieutenant Governor and confirmed by the Governor General, this Court is bound to recognize and give effect to it as the law of the land, and the case of the Queen v. Kerr (Berton's Rep. 367) has been cited and relied on to establish this position. But it is our opinion that case has no bearing on the question tending to support the view put forward. That case was decided when, in the language of Chipman, C. J., "the Lieutenant Governor, Legislative Council and Assembly, formed the legislative body of the Province, subordinate, indeed, to the Parliament of the Mother Country, and subject to its control, but with this restriction, having the same power to make laws binding within the Province that the Imperial Parliament has in the Mother Country, and the propriety and necessity of such enactments are within the competency of the Legislature alone to determine," adding, "it is a thing unheard of, under British institutions, for a judicial tribunal to question the validity and binding force of any such law when duly enacted. While the law remains on the statute book the Courts are absolutely bound to give effect to it. And after speaking of a peculiarity in Colonial legislation, not bearing on this point, he says: "But a law passed in proper form by the Provincial Legislature," with this most important qualification (at least a law not objectionable on account of its repugnancy to an Act of Parliament relating to the colonies) "goes into force and must be executed, subject to be disallowed by the Sovereign," and Mr. Justice Parker agreed with the counsel so far as to think that cases may occur in which the Court would be bound to pronounce its opinion upon the validity of an Act of Assembly, for instance, when it conflicted with an Act of the Imperial Parliament. What was propounded in this case was doubtless good law at the time and under the circumstances under which it was delivered; but as it is applicable at the present day to

the case before us, so far from supporting defendant's contention it is directly against it. The British North America Act entirely changed the legislative constitution of the Province; the Imperial Parliament has intervened, and by virtue of its supreme legislative power has taken from the subordinate legislative body of this Province the plenary power to make law which it formerly possessed by depriving it of the right to legislate in all matters coming within certain enumerated classes of subjects, and has, within the Dominion of Canada, delegated the sole right to deal with such matters to the exclusive legislative authority of the Parliament of Canada; insolvency being one of these subjects, and the Local Act the validity of which is now questioned, treating of matters, in our opinion, directly within that subject, the Act in question being an Insolvent Act in the strictest sense of the term, there arises an undoubted conflict between the statute of the Imperial Parliament and such Act of the Local Legislature, and presents the case suggested by Mr. Justice Parker, where we are bound to pronounce our opinion on the validity of the Local Act. The Imperial Statute says that the Parliament of Canada shall exclusively legislate on bankruptcy and insolvency, in other words, that the inhabitants of the Dominion shall be bound only by laws passed after the 1st July, 1867, within the Dominion, on these subjects, by the Parliament of Canada. The subordinate legislative body of this Province, in defiance of this statute, has undertaken to legislate on this subject, and by so doing seeks to bind the inhabitants of this portion of the Dominion by their Act. Their right to do is now contested, and under these circumstances can there be any doubt as to what we are bound to do? We think not. We must recognize the undoubted legislative control of the British Parliament, and give full force and effect to the statute of the Supreme Legislature, and ignore the Act of the subordinate, when, as in this case, they are repugnant and in conflict. The general and large legislative power which the Local Legislature formerly had, as put forward by Chief Justice Chipman, they do not now possess; their powers are now controlled and limited by the Imperial Statute. While in certain cases they have the exclusive right within the Dominion, in others on which formerly they might have legislated all right is taken from them. The constitution of the Dominion and Provinces is now, to a great extent, a written one, and where under the terms of the Union Act the power to legislate is granted to be exercised exclusively by one body, the subject so exclusively assigned is as completely taken from the others, as if they had been expressly forbidden to act on it; and if they do legislate beyond their powers, or in defiance of the restrictions placed on them, their enactments are no more binding than rules or regulations promulgated by any other

unauthorized body. The fact of this Act having been confirmed by the Governor General was much relied on as giving it a binding force and effect, but we fail to see how this can be. No power is given to the Governor General to extend the authority of the Local Legislature or enable it to override the Imperial Statute, which would be the necessary result if the Local Legislature could, by assuming the right to legislate on a prohibited subject, have their action legalized and validity given to their Acts by the simple confirmation of the Governor General, thus making the individual act of the Local Legislature, or of the Governor General, or their united acts, superior to the Parliament of Great Britain. Fortunately, no great practical inconvenience can hereafter arise by reason of the Local Legislature having exceeded its powers; in this instance the result simply is that the order must go to prohibit the County Court Judge from proceeding or acting under the Acts passed by the Local Legislature, subsequently to the coming into operation of the British North America Act, 1867, altering, amending, or repealing the laws relating to insolvent confined debtors, but only so far as they legislate on the matter of insolvency, the jurisdiction, however, of the County Courts and their respective Judges remaining unimpaired under the laws of this Province relating to insolvency as existing when the British North America Act, 1867, came into force. The sooner the respective legislative bodies of the Dominion realize the full effect of the change in the constitution of the country, and the fact of their present limited powers of legislation, the less likely is it that any conflict of law will arise, or the judicial tribunals be called upon to ignore laws passed in an apparently legitimate way, and in a manner hitherto properly considered by the people as obligatory. And they will be saved the difficult task of deciding more doubtful intricate questions, sure to arise if caution is not observed. For it is well said by that distinguished jurist, Chancellor Kent, "the *conflictus legum* is the most perplexing and difficult title of any in the jurisprudence of public law." Nothing can be gained by exceeding the limits fixed, but much inconvenience and loss must result to individuals, and the public interest be jeopardized; for in all usurped jurisdictions the usurpation can operate, only to lower in public estimation the legislative or judicial body, by which jurisdiction not rightly belonging to it is grasped.

If any doubt exists as to the correctness of the conclusions at which we have arrived, we should, though entirely clear in our own minds, earnestly desire that an appeal should be taken, so that this important constitutional question may be for ever set at rest by the final determination of Her Majesty, under the advice of the judicial committee of the Privy Council of Great Britain.

KINNEAR and another *v.* ROBINSON

Certain liquors manufactured in Ontario, prior to July, 1867, warehoused for exportation and having paid no excise duty, were exported to Portland, U. S., where they were landed and immediately exported to St. John, N. B., where they arrived after the British North America Act came into force, being under the control of the Customs authorities during the whole period of transit until they left Portland.

Held, That by passing through the United States they did not become foreign goods, and were entitled to be admitted free of duty, under the 121st section of the British North America Act.

That coming from a foreign country they were *prima facie* foreign goods, and the burden of proving that they were not so, to the reasonable satisfaction of the Custom House authorities, was on the importer.

The special case stated for the opinion of the Court was as follows:

This is an action of trespass on the case brought by the plaintiffs against the defendant to recover damages for an alleged breach of duty on the part of the defendant, as collector of customs at the port of St. John, and trover for the conversion of one hundred and eighty-nine puncheons of alcohol and spirits. The defendant has pleaded the general issue, and issue having been joined thereon, the following case has been stated for the opinion of the Court. The plaintiffs were and are now merchants, doing business in partnership in the city of St. John, under the name and style of Kinnear Brothers. The defendant has been for many years and still is the Provincial Treasurer of the Province of New Brunswick, and has had the direction and management of that department. On the 16th day of July, 1867, one hundred and eighty-nine casks of alcohol and spirits were brought into the port of the city of St. John from Portland, State of Maine, one of the United States of America, in a schooner called the "Quickstep," of which Charles W. Dickson was master. The following is a true copy of the master's report or manifest, and which was afterwards presented by him on his arrival, at the Treasurer's office, viz:—

83, TREASURER'S OFFICE, St. John, July 16, 1867.

Manifest of the cargo on board the schooner *Quickstep*, Dickson, master, from Portland, Me., of the burthen of ninety-six tons, as per Rr. Register of St. John, with five men.

Marks and Numbers.	Quantity and Description of Goods.	Consignees.
	147 Puns. Spirits. 42 " Alcohol. 50 Brls. Flour, free.	Kinnear Bros.
	50 Brls. Flour, free.	A. W. Marsters & Co. Charles A. Bovey.

No Passengers.—Small Stores.
L. & H. dues paid.—March, 1867. (Signed) CHAS. W. DICKSON.

I, C. W. Dickson, of St. John, master mariner, do swear that I am master of the *Quickstep*, and that the above manifest subscribed by me contains a full report of the particular marks, numbers and contents of all the different packages and parcels of goods on board; the particulars of such goods as are stored loose; the place where such goods were taken on board; the name of every owner and consignee; number of passengers and surplus stock or stores remaining on hand; and that bulk hath not been broken, nor hath any thing been landed from such vessel since her departure from Portland, Me., to the best of my knowledge and belief.

(Signed) CHARLES W. DICKSON.

Sworn to at St. John, this 16th day of July, 1867, before me,

(Signed) H. WHITESIDE, *Col.*

The plaintiff, Charles F. Kinnear, who claimed to be owner, with his partner, the other plaintiff. of the above alcohol and spirits, and who are named in the manifest as the consignees of the said alcohol, and whose title is not disputed, did, on the 17th day of July, 1867, offer a paper to the defendant as for a free entry of the liquors, of which the following is a copy, viz:—

Imported in the *Quickstep*, Dickson, master, from Toronto *via* Portland, by Kinnear Brothers, 189 puns. Canadian Spirits, 21,523 gallons, $13,959.78, produce and manufacture of Ontario, Canada.

I, C. F. Kinnear of this city, merchant, do swear that I am authorized by the above named importers to make this entry and affidavit; that the goods in the foregoing entry are correctly described, and that there are not any articles in the above mentioned packages liable to duty, to the best of my knowledge and belief.

(Signed) C. F. KINNEAR.

Sworn to at St. John, this 17th day of July, 1867, before me,

[Entry for Free Goods.]

And tendered the certificate of the Consul at Portland, together with certified copies of entries outward of the liquor from Toronto at Portland. And the said Charles F. Kinnear, acting for himself and the said other plaintiff, claimed of the defendant, upon the tender of such papers, to have the alcohol and spirits entered free of duty, as they were the produce and manufacture of Canada, and entitled to be admitted into this Province free of duty according to the 121st section of the British North America Act, 1867. The defendant maintains, as he asserts, that these papers afforded no proof to satisfy him that the liquors were the produce or manufacture of Canada, nor was there any evidence by regular entries and clearances by the customs of Canada, or other proper and satisfactory evidence produced, shewing that the goods had been legally imported from Canada into this Province, with the intent of directly bringing them from one Province of the Dominion to the other, according to the spirit and meaning of the revenue laws and regulations of the Dominion, so as to entitle them to be relieved from duty, and admitted free under the Union Act; but, being reported to him as coming

from Portland, Maine, one of the United States of America, they must be treated as a foreign article, and were subject to the impost duty of seventy cents per proof gallon, according to the Act of Assembly relating to the importation of such articles, and no entry being made by the plaintiffs of the liquors, according to the requirements of the Act of Assembly, other than the one above tendered, within three days after the arrival of the vessel importing them, he ordered them to be landed and gauged and sent to the warehouse, according to the Revised Statutes, cap. 27, sec. 8, and paid the freight and cartage. On the third day of September, A. D. 1867, the liquors continuing in the warehouse, the plaintiffs again tendered a free entry to the defendant, and furnished several certificates, papers, and affidavits to the effect that the liquors had been manufactured in Ontario, and demanded them, but the defendant refused to deliver them or any part of them until the duties were paid, maintaining that those documents required authentication by the customs of Canada, shewing that such liquors could be legally brought to this Province free of duty, and that while by an order of Council in the then Province of Canada, made prior to the 1st of July, 1867, the liquors in question could not be imported in bond from one part of the Dominion to the other—they had been exported in bond from the Province of Ontario, directly to the United States, thereby escaping the excise duty, and could not be brought back to the Dominion without paying the import duty. After such demands and refusals aforesaid, upon further inquiry the following facts in connection with the said alcohol and spirits were developed:—

On the 1st of June, A. D. 1867, proceedings took place in the Executive Council of the Government of the then Province of Canada, as set forth below, viz:

Copy of a report of a Committee of the Honorable the Executive Council, appointed by His Excellency the Administrator of the Government in Council, on the 1st June, 1867:—

On a memorandum dated the 31st May, 1867, from the Honorable the Minister of Finance, submitting for the consideration of your Excellency in Council that, under existing regulations, spirits manufactured in Canada may be exported in bond to the Provinces of Nova Scotia and New Brunswick, and may be again placed in bond there as a foreign importation, and that the Imperial Act of Union provides that 'All articles of the growth, produce or manufacture of any one of the Provinces of Canada, Nova Scotia and New Brunswick, shall, from and after the Union, be admitted free into each of the other Provinces.' The effect of which, in his opinion, would be to relieve any spirits which had been manufactured in Canada and was held in bond in Nova Scotia or New Brunswick, from the payment of excise and import duty; he therefore recommends that he be authorized to restrict the exportation in bond to any port or place in the Province of Nova Scotia or New Brunswick, of all spirits manufactured in this Province. The Committee advise that the course proposed by the Honorable the Minister of Finance be approved and adopted.

To Hon. the Minister of Customs, &c. &c. Certified.

And thereupon the following order was issued to the Collectors of Customs of the Inland Revenue Department in Ontario and other Customs Department, viz:—

FINANCE DEPARTMENT, CUSTOMS AND EXCISE.

Ottawa, 3rd June, 1867.

SIR,—I have to call your attention to an order approved by His Excellency the Administrator of Government in Council of the 1st instant, and by which it is directed that exportation to any place in the Province of Nova Scotia or New Brunswick of all spirits manufactured in this Province is restricted.

You will, therefore, be particular in not allowing any vessel already having Canadian spirits on board, to clear from your port for either of the before named Provinces, or any such spirits admitted to entry ex-warehouse thereto, from and after the 1st inst., and until further ordered.

I am, Sir, your obedient servant,

(Signed) THOS. WORTHINGTON.

Asst. Com. Cust. & Excise.

This order continued in force, and no alcohol or spirits were, during the months of June or July, 1867, permitted to be exported in bond to the Provinces of Nova Scotia or New Brunswick.

The liquors in question were manufactured by Gooderham & Worts, distillers, in Toronto, in Canada, in 1866 and 1867, and after such manufacture were entered and bonded in the warehouse there, agreeably to the Acts of the Canadian Parliament, 27 and 28 Vict. cap. 3, and Acts in amendment thereof. On the 24th day of June, 1867, at the Inland Revenue Department, Toronto, Gooderham & Worts entered into a bond to the Queen, in the penalty of $9,568—reciting that whereas the above bounden Gooderham & Worts had given notice of their intention to export to Portland, Maine, U. S., on the Grand Trunk Railway, the goods enumerated in the bond, which goods were then deposited in the proper warehouse under the provisions and regulations of the Act 27 and 28 Victoria, it was, by that bond, among other things, conditioned that the goods therein described and every part thereof should be duly shipped, and should be exported to and landed at Portland, Maine, United States, aforesaid, or be accounted for by Gooderham & Worts, to the satisfaction of the collector of the port of Toronto, and thereupon, after the making of the said bond, Gooderham & Worts, on 24th June aforesaid, at Toronto, entered the goods described in the obligation, with the proper officer of the Inland Revenue Department, as exported in bond to Norton, Chapman & Co., Portland, U. S., to be removed and delivered at the port of Portland *via* Coaticook, Grand Trunk Railway cars, No. 3296 and 2543, and the said goods were duly cleared at Coaticook on 3rd and 5th July, 1867, by James Thompson, collector, a duly authorized officer of the Canadian Revenue Department, Coaticook being a British colonial port or place of entry and

clearance in the Province of Quebec, bordering on the United States, the last port or place of entry through which the Grand Trunk Railway passes before entering the United States for Portland, Maine, and on the 25th day of June, 1867, at the Inland Revenue Department, (Toronto), Gooderham & Worts gave another bond to the Queen, in the penalty of $30,318.50, and of precisely the same tenor as the first, for the exportation of the remainder of the liquors to Portland, Maine, and on the same day, at Toronto, made due entry of the goods therein described of the same form and tenor, and as having been warehoused by them 21st November and 31st December, 1866, and to be exported in bond to Norton, Chapman & Co., Portland, Maine, 25th June, 1867, to be removed and delivered at the port of Portland *via* Coaticook, Grand Trunk Railway cars, Nos. 2658, 2319, 382, 2946, 1038, 237 and 3141, and the same were cleared *via* Coaticook, by the proper officer, 28th and 29th June, 1867, were duly landed in Portland aforesaid, and on the 6th day of July, 1867, Norton, Chapman & Co. made entry at the collector's office, at the custom house, Portland, Maine, of one hundred and twenty-six puncheons of the liquors in question imported for warehouse by them in the Grand Trunk cars from Toronto *via* Island Pond, (being the first port of entrance and clearance in the United States which the Grand Trunk meets after leaving Coaticook), under customs seal on 1st day of July, 1867, and to be immediately exported by Norton, Chapman & Co., in schooner *Quickstep*, Dickson, master, for St. John, N. B., and on same day made oath to the above before the collector, and on the same day at Portland, Maine, United States, Norton, Chapman & Co. entered into a bond to the United States in a penalty of $71,540, conditioned, among other things, that the merchandize, consisting of one hundred and twenty-six puncheons of the spirits in question, entered that day by Norton, Chapman & Co., to be exported in the schooner *Quickstep*, Dickson, master, for St. John, N. B., or any part thereof, be not re-landed at any port or place within the limits of the United States.—On subsequent days, Norton, Chapman & Co. made three other respective entries and oaths, and entered into three other respective bonds for other parts of the liquor—the said four sets of papers embracing the whole of the liquor in question. The liquor so manufactured and warehoused by Gooderham & Worts in November and December, 1866, and June, 1867, as aforesaid, and which were and are the produce and manufacture of the Province of Ontario, in Canada, were and are the same one hundred eghty-nine puncheons bonded, entered and exported by them on 24th and 25th June, 1867, to Norton, Chapman & Co., Portland, as aforesaid; and are the same liquors which were imported and bonded by Norton, Chapman & Co., and exported and shipped by them, and im-

ported into the city of St. John in the schooner *Quickstep*, and now claimed by the plaintiffs. The excise duty of sixty cents per proof gallon, payable on such alcohol in Toronto when entered for consumption. has never been paid by anybody.

Three questions are submitted to the opinion of this honorable Court, namely :—

First.—Whether the tender of the papers for a free entry on the 17th day of July, 1867, as stated in this case, was such proof, as the defendant should have acted upon, of the alcohol and spirits being the growth, produce and manufacture of Canada, and made it his duty thereupon to receive a free entry thereof from the plaintiffs, according to the 121st section of British North America Act, 1867. without further evidence, and to render it unlawful for the defendant to send the liquors to the warehouse.

Secondly.—Whether the documents tendered by the plaintiffs to the defendant on the 3rd September, 1867, were such as to make it his duty to deliver the liquors in question to the plaintiffs, free of duty, and to render their further detention unlawful.

Thirdly.—Whether, upon the whole facts stated in special case, the liquors in question were liable to the import duties claimed by the defendant at the time they were reported to him by the master of the schooner *Quickstep*.

The two first questions, if decided against the plaintiffs, to affect only the damages and costs in this action, and not to exclude the plaintiffs from the benefit of the judgment of the Court on the third question, should it be in their favor. The case was argued in Hilary Term last.

S. R. Thomson, Q. C., and *C. W. Weldon*, for the plaintiffs. We contend that by the 21st section of the British North America Act, the liquors were entitled to be admitted into New Brunswick free of duty, they being the produce and manufacture of the Province of Ontario. They were manufactured prior to the passing of that Act, and we have nothing to do with the collection of the excise duty of Ontario, and the defendant had no right to refuse to admit the goods on the ground that the excise duties had not been paid. It has been contended that the liquor, by going into the United States in transit, has lost its national character and become subject to duty ; but it is a common practice to send goods from Montreal to St. John *via* the Grand Trunk to Portland, and it will not be contended that if there was a duty on American flour, Canadian flour sent in this way would become subject to duty. No fraud has been committed, for

the excise duty was only on liquors consumed in Ontario. The other points depend entirely on this one. We contend that the defendant had in the first place sufficient proof to shew him that these liquors were the produce of Ontario and therefore entitled to be admitted free. He took the property at his peril when the plaintiff represented it to be the growth of Ontario. Afterwards, in September, when we shewed by affidavits and proof the origin of the liquors, there was no excuse for holding them.

D. S. Kerr, Q. C., for the defendant. The 121st section of the British North America Act cannot be taken to over-ride all the other sections. It must be construed with the others. The plaintiff ignore the 122nd section, which declares that the customs and excise acts shall remain in force until regulated by the Parliament of Canada. The Union Act looked at in regard to reciprocal trade was designed to do away with the hardships of exacting customs duties between sister provinces, but it left all other matters as before until regulated by Parliament. Even long before the Act passed the legislation of all the Provinces had been in the direction of promoting reciprocity between them, and for that purpose ample powers were given to their governors in council to make regulations for the free admission of certain goods coming from one Province to another. In this case the goods by being sent into the United States became a foreign article and liable to duty. And the 121st section of the Act can only be taken to apply to goods passing direct from one Province to the other. It was never intended that this should be made a pretext for evading the excise duties, and the 121st section must be harmonized with and qualified by the 122nd section. The Union Act, in allowing certain goods to come in free, preserved the right of the Provinces to exact duties on all others. The laws of each Province must be construed with the Union Act, the excise laws of Ontario as well as the custom laws. As to the proof, even if the goods were not liable to duty, that was not sufficient. The first entry was a perfect nullity. The law lays down, in a specific manner, the mode of giving proof of the origin of an article when removed from one country to another, and these requisites have not been complied with.

C. W. Weldon in reply.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

After giving an abstract of the special case. The questions submitted for the consideration of the Court are:—

First, whether the tender of the papers for a free entry on the 17th day of July, 1867, as stated in this case, was such proof as the defendant should have acted upon, of the alcohol and spirits being the growth, produce and manufacture of Canada, and made it his duty thereupon to receive a free entry thereof from the plaintiffs, according to the 121st section of the British North America Act, 1867, without further evidence, and to render it unlawful for the defendant to send the liquors to the warehouse.

Secondly, whether the documents tendered by the plaintiffs to the defendant on the 3rd September, 1867, were such as to make it his duty to deliver the liquors in question to the plaintiffs free of duty, and to render their further detention unlawful.

Thirdly, whether upon the whole facts stated in the special case the liquors in question were liable to the import duties claimed by the defendant, at the time they were reported to him by the master of the schooner Quickstep.

It will be perhaps more convenient to discuss the the third question first. Previously to the passing of the British North America Act, 1867, the then Province of Canada and the Province of New Brunswick were as distinct and separate, with respect to the passing of laws for the imposition of duties and regulation of revenue matters, as if they had been foreign states, and consequently laws passed in or regulations made under any such laws in one of such Provinces had no power or effect outside of its own limits, certainly not within the limits of the other. What we have to determine is, in the first place, were these goods legally imported into New Brunswick and on such importation were they free from or liable to duty in New Brunswick? This must depend not on the law of Ontario as part of the former Province of Canada, for the then Province of Canada had no right either to enforce or remit duties in New Brunswick, but on the laws in force in New Brunswick at the time of the coming into operation (1st July, 1867), of the British North America Act, 1867, subject always to the provisions of that Act. The state of the law in Ontario as a part of the former Province of Canada and the orders in council authorized by, and promulgated under, that law have been much pressed on our consideration, but it is difficult to discover what such laws or orders have to do with the present question. We are not called upon to enquire whether, with respect to these goods, anything took place in Ontario whereby any law or regulation in force there has been infringed. If they have been, the remedy must be under those laws, and with this we, in the present discussion, have nothing to do. The treasurer in July, 1867, had no authority to act under the laws of the former Province of Canada;

his duty was to see that the revenue laws in force in New Brunswick were complied with, and to collect duties on such goods only as were liable to duty under the local laws of New Brunswick, subject always to the provisions of the British North America Act, 1867. If, however, it was our duty to see that there had been no breach of the laws of the former Province of Canada, with the information before us, as at present advised, we should say that these goods were in every respect duly and legally exported from Ontario, having been manufactured in Ontario and warehoused according to law for exportation. From thence they were, in regular course and in strict compliance, as far as we can discover, with the requisities of the law then in force in Ontario, duly exported, and they appear to have passed from the possession and control of the revenue officers in Canada to the hands of the revenue officers of the United States of America at Island Pond, the first port of entry and clearance in the United States which the Grand Trunk meets after leaving Coaticook, a British colonial port or place of entry and clearance in the Province of Quebec bordering on the United States, the last port or place of entry through which the Grand Trunk passes before entering the United States of America for Portland, Maine, and from thence under customs seals to the revenue officers in Portland, where they were duly entered to be immediately exported to St. John by the schooner Quickstep and were so exported. By this operation what law was broken? It is said no excise duty was paid in Ontario nor should any have been paid, the excise duty only attached on goods consumed there. These goods were legally exported from thence and so legally escaped any excise duty in Canada under the laws then in force in Ontario, and passing under the customs seal through Maine for immediate exportation, and being duly exported in bond no import duty attached to them in the United States of America, so that when they left Portland, there had been no breach of any law either of Ontario or the United States of America, and no liability to pay duties in either country. Then arises the question, were they liable to duty on arrival and entry at St. John? They would undoubtedly be so under the local laws in force in New Brunswick coming from Portland or Toronto, as goods brought into the Province, whether coming from any port in the British Empire or foreign place, unless as being the produce and manufacture of Ontario, they were by virtue of section 121 of the British North America Act, 1867, entitled to admission into New Brunswick, notwithstanding the Local Acts, free of duty, and to this privilege they clearly would be entitled, unless they lost the character of the place of their manufacture by passing through the United States of America. Though by the British North America Act, 1867, the

exclusive legislative authority of the Parliament of Canada extends to the regulation of trade and commerce, by the same Act it is unequivocally declared that all articles of the growth, produce or manufacture of any one of the Provinces, shall, from and after the Union, be admitted free into each of the other Provinces, and though by section 122 the customs and excise laws of each Province are continued in force until altered by the Parliament of Canada, they are so continued "subject" expressly "to the provisions of the Act" so that neither the customs nor excise laws of the former Province of Canada nor of the Province of New Brunswick could, after the Union, operate in any way to prevent the provisions of the Union Act from having full force and effect, and so could not hinder the admission, free, of such articles as those that Act declared should be admitted free. The matter in contention then resolves itself into the simple question, did these goods, being unquestionably the produce and manufacture of Canada, by passing through a portion of the United States of America, in the manner set forth in the special case, lose their original character, and for the purposes of revenue in New Brunswick cease to be the produce and manufacture of Ontario, and so on their arrival at St. John become liable to duty as foreign goods coming from the United States of America? These goods were never under the control of the exporter or importer from the time they left Toronto until they reached Portland or while there, but were under the supervision and control of the customs authorities of the two countries through which they passed. The packages were taken from the warehouse in Toronto, placed in the cars of the Grand Trunk, which cars were likewise warehouses for the time of their transmission, were handed over to the custom house authorities of the United States of America, passed by them, under their seal, over the Grand Trunk to Portland; the packages were never broken, they were never entered for consumption in the United States of America, they never paid duty there, but were entered to be immediately exported to St. John, N. B. They were, therefore, never in a position to be used or consumed either in Canada or the United States. The United States territory was merely used in accordance with the law and with the sanction of the revenue officers, for the purpose of transportation from Canada to St. John. Under these circumstances how and when did they lose their original character? Though not bonded from Toronto to St. John, they were in fact brought from Toronto to St. John, *via* Portland, Maine, in bond; they never became nationalized, if we may use the expression, in the United States of America, by being entered for consumption, by paying or being liable to pay duty, or being capable of being consumed there or used there by the importers. While they were

in the United States they were merely *in transitu;* they obtained no privileges under the laws of the United States, but that of passing through the country. No law of the then Province of Canada or of the United States having been violated, and their importation into St. John being strictly legal, they were, when they arrived at St. John, in law as in fact, the produce and manufacture of Canada, and therefore free under the 121st section of the British North America Act, 1867. It is a long established and well settled rule of law that a duty cannot be imposed on the subject except by clear and unambiguous language, and that the meaning of the Legislature must be distinctly made out from the terms of the Statute. It follows almost necessarily as a corollary that where a duty is removed by clear and unequivocal words we ought not by a strained construction or by the interpolation of any conditions or restrictions not clearly imposed by the Legislature, nor by a doubtful interpretation to attempt to retain it, because under peculiar circumstances with respect to some particular articles its abolition may be supposed to operate prejudicially. If there has been any omission in the Act itself, or if the authorities in Ontario could have prevented the goods coming through the United States in bond, as they did, for the express purpose of securing the excise duty in Ontario, by the order in Council prohibit their coming direct to New Brunswick in bond, and failed to do so, in either case we cannot alter the law to cure the omission. Our duty is plain, we are appointed to administer the law as we find it not to make the law—*jus dicere et non jus dare.* Therefore we are constrained to say in answer to question three that the liquors in law were not liable to the import duties claimed by defendant.

As to the first and second questions the case in the first question seems to assume that defendant was entitled to some proof of the goods being the growth, produce and manufacture of Canada. This, we incline to think is so, and as the goods came from Portland, and would, therefore, *primâ facie,* be foreign and liable to duty, the burthen was on the plaintiff to shew, if required, to the reasonable satisfaction of the treasurer, that they were exempt from duty, the Revised Statutes, in the event of any dispute arising touching the cause of forfeiture of any goods seized, casting the burthen of proof upon the owner or claimant, and we think that defendant having, on the 16th July, refused the entry "because the papers afforded no proof to satisfy him that the liquors were the produce or manufacture of Canada," was justified in doing so. But defendant being, on the 3rd September, tendered a new entry and being furnished further certificates, papers and affidavits (all of which are referred to in the case), which established clearly and satisfactorily that the liquors

had been manufactured in Canada, the manner in which they had been exported from thence, the manner in which they had been conveyed to Portland, and then immediately exported in bond therefrom and shipped to St. John, and the treasurer having refused to deliver them, or any part of them, until the duties were paid, maintaining that those documents required authentication by the customs of Canada, shewing that such liquors could be legally brought into this Province free of duty, and that while by an order of Council made prior to the 1st day of July, 1867, in the then Province of Canada, the liquors in question could not be exported in bond from one part of the Dominion to the other, they had been exported in bond from the Province of Ontario directly to the United States of America, thereby escaping the excise duty, and could not be brought back to the Dominion without paying the import duty; thereby abandoning his previous objection as to want of proof of the liquors being the produce and manufacture of Canada, but, assuming them to be such, claimed they were notwithstanding liable to duty, a position, we think, for the reason assigned, untenable in law; and therefore the treasurer having, on the 3rd September, raised no question as to the genuineness or authenticity of the documents presented, nor any doubts as to the goods having been manufactured in Canada; but on the contrary having assumed they were, and not having required any further proofs as to the matters in which we think he only had a right to be satisfied. We think as to the first question that the tender on the 16th July, 1867, was not such proof as defendant should, under the circumstances, have acted upon, and with respect to the second question we think the documents tendered on the 3rd September, 1867, were, under the circumstances, such as to make it his duty to deliver the said goods to plaintiff, free of duty, and to render their further detention unlawful.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NEW BRUNSWICK,

IN MICHAELMAS TERM.

IN THE THIRTY-THIRD YEAR OF THE REIGN OF QUEEN VICTORIA.

THE QUEEN *v.* DUVANEY.

OCTOBER 12, 1869.

Where a magistrate commenced the examination of a party on a criminal charge, and after hearing a portion of the evidence refused to proceed with it further, the Court refused to grant a *mandamus* at the instance of a private prosecutor to compel him to do so.

C. W. Weldon, on behalf of Richard Ellis, the prosecutor, moved for a *mandamus* to compel the police magistrate of the parish of Portland, to proceed with the examination of the defendant, on a charge of adultery with the wife of Ellis. The magistrate refused to go on with the examination because the only evidence offered of the marriage was that of the husband himself, whom he did not consider a competent witness. [RITCHIE, C. J.: Why do you not prepare an indictment and lay it before the Grand Jury?] I think this is the regular way of proceeding. In Rex *v.* The Justices of Cumberland, (4 A. & E. 695), the Court granted a *mandamus* requiring the Justices to hear the complaint of the overseers of Wetheral against a party for refusing to maintain his wife and child. [RITCHIE, C. J.: That was a very different case arising out of 5 Geo. IV., where there was no Grand Jury to have recourse to. A *mandamus* never goes unless the party has no other remedy.] The magistrate having commenced the investigation of the case was bound to go on with it, and he was clearly wrong in refusing to admit the evidence.

RITCHIE, C. J.—I am clearly of opinion that this application for a *mandamus* should not be entertained. I would not be disposed in such a case as this to grant a *mandamus* at the instance of a private prosecutor. It is not the policy of the law to encourage private prosecutions which are generally entered into more to gratify private feelings than to serve the interests of justice. But another fundamental and fatal objection is that the party here has another remedy. for he can prepare an indictment and lay it before the Grand Jury; and, as held by Buller, J., in Rex *v.* Bishop of Chester, (1 T. R. 404), it is a general rule that *mandamus* does not lie, unless the party making the application has not any other specific legal remedy.

ALLEN, J.—I think that where the magistrate has exercised his judicial discretion, as he has done in this case, the Court neither has the power, nor if it had, would it be disposed to exercise it by granting a *mandamus*. If the party wishes to proceed he has his remedy before the Grand Jury.

WELDON, J., and FISHER, J., concurring.

Rule refused.

Ex parte JARDINE.

OCTOBER 12, 1869

A Judge of the County Court may examine and make his order for the support or discharge of any debtor, in any County within his district, even if the debtor has been arrested and is in gaol, or on the limits in another County in his district.

Where the creditor's attorney was in Court, and heard the order for support made notice of it is not required.

H. B. Rainsford moved for a rule *nisi* to shew cause why the proceedings had before James W. Chandler, Judge of the County Court, for the Counties of Albert, Westmorland, and Kent, and his order for support and discharge in the case of Gilbert Myshrall, an insolvent confined debtor, should not be removed into this Court by *certiorari*. The debtor was arrested in the County of Albert and there placed on the limits, but the examination was held at Dorchester, in the County of Westmorland. The Judge made the order for support in his Court verbally in the presence and hearing of the attorney for the creditor, but no notice of the order in writing was received by the creditor or his attorney. The debtor was afterwards discharged from the limits, on failure of payment of the sum ordered for his support. The grounds of the motion were: 1st. That the examination should have been held in the County of Albert, where the arrest was made, and that the Judge had no power to hold it in

Westmorland. 2nd. That the creditor or his attorney had no notice of the order for support.

RITCHIE, C. J.—There is no doubt about this case. The County Court Act, 30 Vict., cap. 10, sec. 2, authorizes the appointment of Judges to have jurisdiction in certain districts, of which Albert, Westmorland and Kent form one. For the purpose of trying causes, each County, of course, stands by itself. A cause which arises in Albert cannot be tried in Westmorland, nor a cause from Westmorland in Kent, no more than a Judge of the Supreme Court, sitting under a commission of oyer and terminer, in a certain County, can try cases brought from other Counties. But the granting of a Judge's order in the case of an insolvent debtor is very different. By the 30th Vict., cap. 10, sec. 32, it is enacted that "the several County Courts and the respective Judges thereof shall have and exercise all the powers and authority vested in the Supreme Court or the Judges thereof respectively by cap. 134, title 34, of the Revised Statutes of Insolvent Confined Debtors." It has never been contended before the establishment of County Courts that a debtor in Restigouche, where a Judge goes on the Circuit only once a year, has to wait there a whole year for a Judge to come. The County Court Judges have the same powers in their districts that the Supreme Court Judges have with reference to insolvent debtors, and the Legislature never contemplated that the Judges should be obliged to travel from County to County to relieve every debtor. The debtor must, therefore, necessarily go to the Judge. As to the creditor not having notice of the order, his attorney was present in Court when the order was made and was bound to take notice of it.

ALLEN, J.—I am of the same opinion. The County Court Judge has in cases of insolvent debtors the same power as Judges of the Supreme Court, and may discharge a debtor in any County within his district. As to the order, the attorney for the creditor was present in Court, and heard it made, so there was no need of service of notice.

WELDON, J.—I am of the same opinion. It is not the practice to serve an order for support.

FISHER, J., concurred.

Rule refused.

McLEOD *v.* THE COMMISSIONERS OF THE EUROPEAN AND NORTH AMERICAN RAILWAY.

OCTOBER 20th, 1869.

A stream diverted into a new channel by the Commissioners of the European and North American Railway, under 19 Vict. cap. 17, became obstructed in consequence of the new channel filling up and overflowed plaintiff's land.

Held, 1. That the Commissioners were bound to keep the channel open, and were liable to action for the damage to plaintiff's land.

2. That the fact of the plaintiff having been paid by the Commissioners land damages for the diversion of the stream was no bar to his recovering damages for their subsequent neglect to keep the channel open.

3. The Act of Canada, which superseded the Commissioners, did not take away the right of action against them where the cause arose prior to the passing of the Act.

This was an action to recover damages for the overflowing of the plaintiff's land, caused by the defendants by the diversion of Salmon River and Trout Brook, into a new channel under the authority of 17 Vict., cap. 17, § 4. At the trial before WELDON, J., at the last King's Circuit, it appeared that the channel made by the defendants was too small to carry off the water which was required to flow through it during heavy freshets; that it had become filled up with rubbish and debris, and that the plaintiff's land had been overflowed in consequence, and five or six acres of it rendered not worth mowing. Evidence was given to show that during the summer and autumn of 1867 the plaintiff had sustained large damage from this cause. Under the direction of the learned Judge the jury found for the plaintiff, for the damages he had sustained between the 1st August, 1867, and 21st December, 1867, the day on which the Act relating to the Public Works of Canada, which transferred the power of the commissioners to the Board of Works, came into force. The sections of the Act under which the diversion was made and the evidence as to damage are set out in the judgment of the Court.

Wetmore, Attorney General, in Michaelmas Term last, obtained a rule *nisi* for a nonsuit on the following grounds: 1. There was no proof of the appointment of the commissioners. 2. That the land taken for the diversion of the stream did not become vested in the Crown, to be under the control of the commissioners, but that the new stream became subject to public rights, the same as the original stream, and no action would lie. 3. That the claim for damages, if any, must be by assessment in the manner pointed out by the Act of Assembly, and not by action. 4. That the commissioners being created by statute have no more powers and duties than these given by statute, and the statute fixes no such duties upon them as are now sought to cast upon them. 5. Under the Act 22 Vict. cap. 24,

no remedy lies against the commissioners for acts done under 19 Vict., cap. 17, sec. 6. That under the British North America Act, 1867, the railway became vested in the Dominion, and ceased to be under the control of the commissioners.. 7. The Act relating to the Public Works of Canada transfers the power of the commissioners to the Board of Works, and their power and the right of action against them ceased. 8. That the claim for damages, if any, should be made under the Canadian Act· 9. That the commissioners had only power to do lawful acts, and have not power to go outside of the railway. 10. That the acts, if any, done, which led to the damage to the plaintiff, were done in 1862, and no claim having been made, it is barred by the Statute of Limitations.

A. L. Palmer, Q. C., shewed cause in Hilary Term. 1. As to there being evidence of the appointment of the commissioners the Act 22 Vict., cap. 24, authorizes suits against them, and this Act distinctly states their appointment by authority of 19 Vict., cap. 17. As to points two and four I contend that these commissioners acquire the right by their Act in pursuance of the statute, to have the stream pass through this land for the purpose of maintaining and building the railway. It became an easement appurtenant to the railway, or the title to the land vested in the commissioners or the Crown in the same way that land taken for building the line would; and it became the duty of the commissioners to keep it in repair, and not having done so, and damage being caused thereby, they are liable. The Act 19 Vict., cap. 17, allows the commissioners to take more than six rods in width, where it is necessary, which was the case here. And the land having vested in them they are entitled to maintain it in the same manner as the rest of their line, and to keep open the stream in the same manner as it was at first. If the damages could only be recovered by assessment under the Act, it was the duty of the commissioners to place it on record that they intended to alter the level of the river. The plaintiff could not keep in repair, for he could not go on the land to do so, the land being in defendants, (Wash. on easements, 567). The grantee of a way is the party who is to make and repair it. Bell *v.* Twentyman (1 Q. B. 766). The commissioners stand in the position of owners, in fee, of the line. The third point is quite untenable, for the Act provides no remedy against the commissioners for neglect of duty. It was impossible for plaintiff, when the railway was completed, to be aware of the damage that he was to sustain in this way, the filling up of the culvert since having caused the injury. Lawrence *v.* Great Northern Railway Company, (4 L. & E. 265). Turner *v.* Sheffield Railway Company, (10 M. & W. 425). The fifth point is covered by the

second and fourth. 6. The 130th section of the British North America Act continues the power of the commissioners until otherwise provided by Parliament, and consequently their liability. 7. The repeal of an Act does not affect any right of action accruing before its repeal. The plaintiff has only recovered up to the time of the passing of the Board of Works Act. The Canadian Interpretation Act, 31 Vict., cap. 1, sec. 35, provides that when an Act is repealed, all penalties, forfeitures, &c., can be recovered that have happened under the old law. 8. This only applies to acts done after the passing of the Canadian Act. 9. This point is covered by point two. 10. There is no bar by the Statute of Limitation here. Conner *v.* McLaggan (2 Kerr 446) is in point against the last proposition.

Wetmore, Attorney General, contra. I contend that they were bound to shew the appointment of the commissioners by proof. [RITCHIE, C. J.: Is not the statutory declaration in the Act, 22 Vict., cap. 24, that they were appointed, sufficient]? I think not. [RITCHIE, C. J.: There is nothing in the point]. The substantial point of the case is that the land taken for the diversion of the stream, does not become vested in the Crown under the Act of Assembly to be under the control of the commissioners, but that the new stream being subject to public rights the same as the original stream, their control over it ceased and they are not liable for any damages caused by its becoming obstructed. Also that the Act of the Parliament of Canada having superseded them, the right of action against them is gone.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

In this case it appeared that the commissioners of the European and North American Railway, in pursuance of the Provincial Statute 19 Vict., cap. 17, took certain lands under section two, which states—"The commissioners for the management and construction of railways appointed under the authority of an Act passed during the present session of the Legislature to authorize the construction of railways within this Province or any of them, by themselves or their servants, are authorized to enter upon and take possession of any lands required for the track of the railways or for stations, and they shall lay off the land by metes and bounds, and record a description thereof in the Registry of Deeds in the county in which the lands are situate, and the same shall operate as a dedication to the public of such lands;" the lands so taken shall not be more than six rods in breadth for the track exclusive of slopes, of excavation and of embankments, except when it may be deemed advisable to alter the

line or level of any public or private carriage road or any stream or river, in which case it shall be competent for the commissioners to take such further quantity as may be found necessary for such purposes." The 4th section states, "The commissioners may alter the course of any river, canal, brook, stream or water-course, and divert or alter as well, temporarily or permanently, the course of any such rivers, streams of water, roads, streets or ways, or raise or sink the level of the same in order to carry them over or under, on the bed of, or by the side of the railway, as they may think proper." 5th sec. The commissioners shall have power to make conduits or drains into, through or under any lands adjoining the railway to carry off the water. On the 18th June, 1859, the commissioners, under the said Act, took certain lands in the parish of Sussex, in the County of Kings, which was on the 21st June, 1859, duly recorded in the Registry of Deeds of that County for the alteration and diversion of Salmon River and Trout Brook, also called Stone Brook in that parish for the line of railway. By these diversions a new channel had to be made for the two streams, and the channel so made was insufficient to carry off the water during heavy freshets, and the debris coming down fills up the new channel at the culvert and overflows the plaintiff's land. It has been gradually filling up every year since the railway was made. One of the witnesses, who is section foreman on this part of the railroad, says: "I know the place, I have been on the road since it was made. I have seen the bed of the new stream, it is filled up from the banks, it is filling up every year. I laid the track nine miles up and down; there are two feet of water in the culvert; freshets cause the wash down of the banks; it would not have occurred in the old river; it could be prevented by rip-rapping." Another witness stated: "The alterations in the new stream ought to have been deeper and wider; at first it did not cause the water to flow back to affect the plaintiff's intervale; it has increased every year; filled up since the last year; has made five or six acres of the plaintiff's intervale land not worth mowing; it has injured the plaintiff £300, being the difference of value before the railroad was built and now; the damage to the mowing grounds, in 1867, would be over $120. It was contended by the defendant's counsel, that by the Act of Assembly the new stream becomes the stream for public rights the same as the original stream, and no action lies against the commissioners for consequential damages; that the damage for any land must be applied for under the Act relating to the appointment of commissioners, and that commissioners have no liablity imposed upon them to keep the new stream from filling up by the wash of freshets; and the plaintiff having obtained compensation from the commissioners in 1862 under

the Act of Assembly, he is now estopped from recovering in this action. That the plaintiff's claims, if any, must be made to the Government of the Dominion under the Act. The jury, under direction of the learned Judge, found the damages the plaintiff had sustained between the 1st of August and the 21st December, 1867.

This was a motion to enter a nonsuit in this case. On the argument in shewing cause it was conceded by the Attorney General that the determination of the case depended upon two points: 1. That the commissioners had a right to divert the stream, and having diverted it, and paid plaintiff his compensation, the commissioners had no more to do with it, and no duty or liability was cast on them with reference thereto. 2. That the commissioners were superseded by the Act of the Parliament of Canada. We think there is nothing in the second point, plaintiff having only recovered for damages sustained between 1st August and 21st December, 1867, the day on which the Act came into force, and we do not think this Act deprived him of the right to recover such damages. As to the first point the damages assigned under the Railway Act, and paid to plaintiff, were only those that could naturally and fairly arise from the diversion of the stream, made in a reasonable and proper manner, and if the commissioners did not make the diversion in a proper and efficient manner, and in consequence of their operations the stream became liable to obstructions, which, had it been properly made, would not have occurred, or which they could by reasonable care prevent, and they neglected to do so, and damage has thereby been occasioned to plaintiff. We think he should be indemnified by damages, such an injury to his property not having been matter for which damages were or could have been assessed. The evidence shewed that the injury has occurred by the diversion of the stream not having been efficiently and properly made by the commissioners, whereby the same became obstructed, rendering it necessary that such obstructions should from time to time be removed, and the new stream kept clear to save the plaintiff's land from being overflowed. This, we think, it was their duty to do, and the case of Baynell v. London & N. W. R. Co., (7 H. & N. 423), affirmed in the Exchequer Chamber, (9 Jur. N. S. 254), though not directly in point, strongly establishes the principle we think should govern this case. We have entertained serious doubts as to whether the plaintiff's case, as proved, has been set out with the requisite technical accuracy, but after consideration we think it is substantially set out, sufficiently to enable him to recover, and we should have been sorry to have turned him round on a mere technical objection, not touching the merits which are in our opinion unquestionably with the plaintiff.

Rule discharged.*

* Fisher, J., having been counsel in the cause, took no part.

(EQUITY APPEAL.)

JARDINE and others *v.* MCWILLIAMS.

OCTOBER 25, 1869.

Where a mortgage on real estate was given by A to B for the purpose of being sold, and afterwards assigned to C. who took it at a discount of ten per cent. B., who acted merely as broker in the transaction, receiving one per cent. Held, In a suit for foreclosure against the purchaser of the equity of redemption that the transaction was usurious, and that even if defendant was ouly the colorable purchaser it would not affect the case.

Where the plaintiff's bill was dismissed in consequence of usury, the Court in appeal refused to interfere with the discretion of the Judge of the Court below. who decided that the costs should follow the result of the suit.

This was an appeal from the following judgment of Mr. JUSTICE ALLEN, which sets out all the material facts of the case:—

The bill in this case was filed by the plaintiffs, as executors and trustees under the will of Benjamin Smith, deceased, for the foreclosure of a mortgage given by James McCoskery to John Kinnear and David S. Howard, on the 3rd February, 1858, to secure the payment of £2,000 in four years, from the date, with interest half-yearly, which mortgage was assigned to Benjamin Smith, on the 23rd March, in the same year. McCoskery afterwards conveyed all his interest in the property to the defendant.

The defence is that the mortgage is void on the ground of usury. The onus is upon the defendant to prove this, and if the evidence of McCoskery is not contradicted he has proved it clearly. McCoskery states that in January, 1858, he applied to Smith for a loan of money; that Smith at first declined, but afterwards said he thought he might do something for him and asked who he did business with; that a few days after this Smith called upon him and told him that he could accommodate him, but it must be through another person and asked whom he could get to do it, and he (McCoskery) said Kinnear and Howard, to which Smith replied that he must make the arrangements through them; that the amount to be loaned was spoken of at this time but not settled. A few days afterwards Smith told McCoskery that Howard had been speaking to him, and he inquired about McCoskery's business transactions with Kinnear and Howard; that it was then agreed that Smith should advance the money at the rate of eleven per cent. That a mortgage should be given by McCoskery to Kinnear and Howard for £2,000, and be assigned by them to Smith, who was to deduct the eleven per cent. from the face of the mortgage. He also stated that he had talked with Howard about borrowing money both before and after the agreement with Smith. He, Howard, had recommended him to

apply to several persons for money, among others to Smith, who, he said, had plenty of money, but his terms were high; that after he had seen Smith he had another conversation with Howard, and told him that Smith said he thought he could accommodate him, to which Howard answered: "We can get the money if you will make the mortgage, and charge you no commission provided you will give us that sale in the spring," referring to a sale of goods McCoskery expected to have in the following spring, and that he then gave Howard instructions to get the mortgage drawn. That previous to this he had told Howard what Smith's terms were; that the mortgage was to be drawn for £2,000, and that eleven per cent. was to be deducted from the face of it.

The mortgage was drawn and executed soon after this and delivered by McCoskery to Kinnear and Howard, who, he said, had no authority to assign or dispose of it to any person but Smith; that he gave them the mortgage with the understanding that Smith was to get it and was to deduct eleven per cent. from the face of it. At the time the mortgage was given McCoskery was not indebted to Kinnear and Howard, or at all events only in a small amount, and though they held some notes of his, falling due in the spring, it is not pretended that the mortgage was made to secure the payment of those notes. The amount received by McCoskery was £1,780, part of which he received from Smith, and the rest through Kinnear and Howard. To rebut this defence the plaintiffs produce the evidence of Kinnear and Howard; Kinnear knows nothing personally of the arrangement with Smith, and appears to have answered the interrogatories with a good deal of caution. In answer to the question whether McCoskery proposed to make the mortgage he says:

"All I can recollect about it is that he came to the office and spoke about wanting money, and the result was he agreed to make this mortgage for that purpose." * * "It was arranged that the mortgage should be drawn to Kinnear and Howard." Again he says: "The arrangement was that we (Kinnear and Howard) were to sell it for his benefit and give him the net proceeds, we being paid brokerage for our trouble." He said also that no persons were named to whom they were to apply to sell the mortgage, and that there was no positive limit to the sum for which it was to be sold; that they got £1,800 from Smith for it and took off £20 as commission for selling it. Howard in his evidence says: "I had several conversations with McCoskery before the mortgage was given; he asked how he could raise money for his business. He said he had a large amount of paper afloat with Mr. Wiggins' endorsement, and he had not sufficient funds to retire them. He asked me what I thought it best to do, and stated that he had the property mentioned in this mortgage

entirely unincumbered. I then proposed to him to raise money on this property by mortgage, and that we could put it on the market and sell it, and hand him over the proceeds; he concluded to do so. After the statement of his indebtedness to me we thought that about £2,000 would be sufficient to meet these present purposes. The mortgage and bond were to be drawn to Kinnear and Howard, and we were to sell it for what we could realize on it; we were not limited as to price, but were to do the best with it that we could. I had previously given him an idea of what I thought it would produce, having previously sold similar mortgages. £1,800 was what we sold it for and was the most we could get for it. The proceeds were accounted for to McCoskery, less our commission of one per cent., making his balance £1,780, which we accounted to him for. It was understood by McCoskery that we were to have one per cent. commission for our trouble in selling it. I had full authority from McCoskery to put the bond and mortgage in the market and sell it for the largest amount I could get for it, and to sell it to whomsoever I pleased." * * "We put the bond and mortgage in the market for sale; I think I offered it to Messrs. Vaughan and also to Mr. F. A. Wiggins; I am sure I offered it to Wiggins; I offered it to them for sale, they declined buying it; I then offered it to Benjamin Smith; he purchased it for ten per cent. off the face, viz., £1,800; I sold it to him for that amount. It was to complete that sale that the assignment, marked C, was made."

Though this evidence contradicts McCoskery on some points, particularly with respect to the right to sell the mortgage, it is singular that Howard, though he was examined some time after McCoskery had given his evidence, does not deny any of the alleged conversations between them about his advising McCoskery to apply to Smith for the money, the terms upon which Smith had agreed to lend, or Howard's offer to get the money if McCoskery would make the mortgage, so in respect to the agreement to charge commission, though the plaintiff put in evidence two accounts rendered by Kinnear and Howard to McCoskery, in which he is charged with various sums of money paid to him on his account between the 9th February and the 16th May, 1858, and is credited with £1,780, as the proceeds of this mortgage, there is no charge for the one per cent. commission, thereby corroborating McCoskery as to the terms on which Howard agreed to be made a party to the mortgage. On the other hand, by the entry in Kinnear and Howard's day-book, dated 23rd March, 1858, the sum of £1,780 is credited to McCoskery, £20 (being one per cent. on the mortgage), credited to commission account, and the whole amount, £1,800, is charged to Smith. It is difficult to understand why this charge for commission was not carried into the

account rendered, if it really was part of the agreement. If McCoskery has given the correct account of the matter there would be nothing extraordinary in Howard's agreeing not to charge commission, because McCoskery had negotiated the loan himself, and the only trouble Kinnear and Howard had was to receive the money from Smith and pay it over to McCoskery as he required it, and for doing this they were to have the sale of his goods in the spring, on which they would receive commission.

Without, however, undertaking to determine which party's evidence is entitled to credit, and whether or not the mortgage was made on the terms stated by Howard, or whether McCoskery himself obtained the loan from Smith on the terms he has stated, I think it is shewn by the evidence of both Kinnear and Howard that the transaction was usurious. It is not disputed that if Kinnear and Howard were the owners of the mortgage, that is, that it was given to secure the debt due to them from McCoskery, they would have a right to sell it for the best price they could obtain, and the purchaser could recover the full amount because there would be no usury in the original transaction. But here Kinnear and Howard never were the owners of this mortgage; it was not given to secure any debt due to them from McCoskery, nor did they advance him any money upon it, but the whole of the money which he received was obtained by them from Smith upon the security of the mortgage, they only (according to their own evidence) acting in the matter as the agents or brokers of McCoskery in obtaining the money. The case, therefore, comes within the principle of Peters v. Irish, (4 Allen, 326).

In Parsons Merc. Law 265, it is said, "there is no doubt whatever that the owner of a note has as good a right to sell it for the most he can get, as he would have to sell any goods or wares that he owned. But on the other hand it is quite as certain that no one has a right to make his own note, and sell that for what he can get for this, while in appearance the sale of a note is in fact the giving a note for money." And in page 266, he says: "If the seller of a note acquired it by purchase, or if it is for money advanced or lent by him to its full amount, he may sell it for what he can get; but if he be the maker of the note or *the agent of the maker*, and receives for the note less than its face after a lawful discount, it is a usurious loan. * * The same rule must apply to corporations, and all other bodies or persons who issue their notes or bonds on interest if sold by a broker for them for less than their full amount it is usurious." In 3rd Parsons on Contracts (144) it is said "if the payer lends, and the borrower gives his notes for legal interest, the lender having thus acquired the note may afterwards sell it for the most he can get, and it is obvious that the lender takes nothing usurious;

if he loses by the second transaction and the purchaser gains, it is a loss and gain on a purchase, and not on a loan and both on authority, and on general principles it would seem that the first owner of the note must pay for its full amount, or else, though he may say he purchases it of the maker, in fact he only lends on his security, and that usuriously. Again, if this be true, when the parties deal directly together it should be equally true where they deal through an agent, and then it would follow that if the maker, whom we may suppose to be one of our railroad corporations, issues its notes or bonds and gives them to a broker to raise money on them for the us eof the corporation, and the broker sells them to his customers for less than the face or par value, such a transaction would be a loan and usurious loan from those customers to the corporation." The law thus stated by Professor Parsons is so apposite to this case that it needs no apology for quoting it at length. In whatever way this case is viewed, whether as a direct agreement between Smith and McCoskery or as an agreement made with Smith through the agency of Kinnear and Howard, the real transaction was a loan at either ten or eleven per cent. interest, and though, according to the evidence of Howard, there may have been the form of a sale, it was very evident that there was not and could not in this case be any actual sale, Smith being in fact the first owner of the mortgage and the only person to whom McCoskery was indebted.

It cannot affect this case though the defendant's purchase of the equity of redemption may be only colourable. The only question here is whether the mortgage is void under the statute of usury, and being of the opinion that it is so the bill must be dismissed, and according to the general rule the costs must follow the result, though it would have been more satisfactory to me if, in this case, I could have felt myself justified by the authorities in refusing the defendant his costs. Bill dismissed with costs.

Wetmore, Attorney General, and *J. A. Wright*, for the appellants. The grounds of appeal are: 1. That the defence that the contract was usurious is not avaliable to the purchaser of the equity of redemption. 2. That there was no evidence of usury and no evidence that Kinnear and Howard were the agents of McCoskery to obtain money at a usurious rate. 3. That the Judge should have directed an issue to try whether there was usury or not. 4. That the learned Judge was wrong in dismissing the bill with costs. There is no usury in this case. Here McCoskery is indebted to several parties, amongst others to Kinnear and Howard, he gives them a mortgage of his property for £2000, with instruction to sell it for the best price they can obtain, and they would have broken

their agreement had they not done so. There was in this case the transfer of the property by instrument under seal; it was not like handing a man a note and the consideration was not usurious. Even if defeated on the main point the defendant is not entitled to costs. [RITCHIE, C. J.: Can a Court of Appeal interfere with the Judge's discretion in that particular?] Considering the unsatisfactory character of McCoskery's evidence, and that he was contradicted by both Kinnear and Howard, and upon the whole evidence, we contend that the transfer was an absolute transfer to Kinnear and Howard for a good consideration, and that between these parties there was no usury.

Duff, Q. C., contra. As to the question of costs that cannot be raised now because the Court of Appeal will not take into consideration a question not presented to the Court below. As to the question of usury it is not necessary to take up the time of the Court in citing authorities. If this case can be supported there was no occasion to repeal the usury laws. No doubt the mortgage was made to be shaved; as between Kinnear and Howard and McCoskery no consideration passed at all, they acted merely as brokers. [RITCHIE, C. J.: They admit that, and if not they were clearly the agents of Smith.] Their testimony is quite reconcilable with the transaction being usurious. The case is not distinguishable from Peters v. Irish (4 Allen, 357).

RITCHIE, C. J.—Whether the account given by McCoskery or Kinnear or Howard of this transaction is taken as correct, there is a clear case of usury established. I have nothing to add to what I said in Peters v. Irish (4 Allen 326). What I then said is, in my opinion, strictly applicable to the present case. "If this is not usury I cannot conceive what usury is, the attempted cover is too flimsy to hide for a moment the real transaction, and using an old expression, 'wink we ever so hard,' unless wilfully blind, we cannot fail to see through it." As to the appeal for costs, Caten v. Caten, (L. R. 1 Ch. 159), and Chappell v. Purdy, (2 Ph. 227), Tayler v. Dowlan, (L. R. 4 Ch. App. 697), I think clearly shew that in such a case as this we cannot interfere. The appeal must be dismissed with costs.

WELDON, J.—I am of the same opinion. This is a clear case of usury, the transfer from McCoskery to Kinnear and Howard was a mere blind to cover the transaction, which was really between McCoskery and Smith.

FISHER, J., concurred.

Judgment accordingly.

KEITH *et al.*, ADMINISTRATORS, *v.* SKINNER.

OCTOBER 20, 1869.

K., who held a quantity of logs claimed by P., sold them to H., who placed the money in the hands of defendant, both parties agreeing that if not replevied by P. in six days it was to be paid to H. P. was about to replevy, but before the six days expired K. agreed with him to submit the matter to arbitration, the money to abide the event, but after the time elapsed, K. refused to arbitrate, and claimed the money under the first agreement.

Held, In an action against defendant on the first agreement for the money, that as the substituted agreement altered the position of the parties, it was an answer to the action.

This was an action brought by the administrators of Samuel Keith, to recover a sum of money placed by him in the hands of defendant, tried before WELDON, J., at the last St. John November Circuit. It appeared that Keith had in his possession one hundred and forty-one M. logs, which were claimed by one Polley, which he sold to Vernon Hanson on the 9th July, 1866, and on that day a memorandum in writing was made between defendant as attorney for Keith and Hanson, by which after reciting the sale it was agreed that the money, amounting to £193 17s. 6d., should be deposited in defendant's hands to be paid to Keith if Polley did not replevy the logs within six days, and in case they were replevied to be paid to the party who was successful before the sheriff's jury. Before the six days expired Keith and Polley agreed to refer the ownership of the logs to arbitration, the owner to receive the money, and in consequence no replevin was issued by Polley; but after the six days were past Keith refused to sign arbitration bonds or consent to an arbitration, as he had agreed, and claimed the money from defendant, who refused to give it up until the arbitration had been had, alleging that he held it as trustee between Polley and him. Plaintiffs declared on the first agreement. The learned Judge left it to the jury to find whether there was a substituted agreement or not, if there was defendant was entitled to a verdict, if not they should find for plaintiff. The jury found that there was a substituted agreement, and a verdict for defendant.

Wetmore, Attorney General, in Hilary Term, obtained a rule *nisi* for a new trial on the ground of misdirection, contending that Keith had a right to revoke his submission to arbitration, that he had done so and that the time named on the first agreement having elapsed he had a right to recover.

S. R. Thomson, Q. C., shewed cause in Trinity Term. We contend that the plaintiffs abrogated the first agreement and substituted another, and that not having declared upon the substituted agree-

ment but on the first they cannot recover. Hanson had no interest in who got the money and was not interested in the abrogation of the first agreement, and although the second agreement was not in writting I contend that it was not necessary to be so. Smith Law of Con. 90. Keith could not recover this money as money paid to his use unless he shewed title to the logs. If he could have shew that he had paid money for the logs he might possibly have recovered on money had and received, but he cannot as the case stands.

F. E. Barker, contra. This is an agreement between Keith and Hanson to which Polley is no party. We rely on the first agreement. The defendant accepted the money under it and was to pay it over in case a certain contingency happened which has come to pass; he is therefore liable If Keith had substituted another agreement it could not affect Hanson's right. RITCHIE, C. J.: In this action it is competent for plantiffs to set up *jus tertii* of Hanson, Keith having agreed to abide by the arbitration.] I contend there could be no substituted agreement, and if there was the death of Keith would be revocation of it. There was evidence that the money belonged to Keith as against Skinner, and no evidence that the latter consented to receive it under any substituted agreement. I submit that there was a misdirection in telling the jury that the second agreement might be substituted for the first, and that Hanson was not affected by it and had no interest in it. It is scarcely necessary to cite authorities to show that a party can revoke an agreement such as this to submit to an arbitration at any time before the bonds are executed.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

This action was tried before WELDON, J., at the St. John Circuit in November last. The facts of the case are these: On the 9th July, 1866, Samuel Keith, the intestate, had in his possession one hundred and forty-one thousand logs, which James Polley claimed. Hanson being desirous of purchasing, with the consent of Polley and Keith, took the logs and paid into Skinner's hands £193 17s. 6d., to represent the logs, under the following memorandum:—

Mr. Samuel Keith has this day sold to Mr. Vernon Hanson one hundred and forty-one thousand superficial feet spruce and pine logs at 27s. 6d. per thousand, amounting to £193 17s. 6d. The money to be deposited in the hands of C. N. Skinner, there to remain for a period of six days, until it be seen if Mr. Polley replevys them; if he does not replevy them, then to be paid to Mr. Samuel Keith at the end of six days; if he does replevy them, then to the party that may be successful on the trial before the sheriff's jury. It being understood that if the logs are replevied that Mr. Hanson

will see that a claim be put in before the sheriff, either in his name or the name of Samuel Keith, as counsel may direct, and that Mr. Keith will save Mr. Hanson harmless in defending the suit. Mr. Keith, though, not to be liable for any more damage than the expense of defending the replevin suit, which expense means legal charges and lawyers' fees.

SAMUEL KEITH.

July 9th, 1866. By his Attorney, C. N. SKINNER.

VERNON HANSON.

Out of this money has been kept $77.55 for Jacob Covey, for bringing the logs down, for which Mr. Skinner is not to be held liable as above.

V. H.
S. K.
By C. N. S

Polley had employed an attorney to issue a replevin for the logs, but before the expiration of the six days Polley and Keith made a new arrangement, whereby they agreed that the dispute about the logs should be left to the decision of arbitrators, and Skinner, who was Keith's attorney, spoke to the attorney of Polley, to prevent the issuing of a replevin; the money to be held in Skinner's hands until the arbitrators should decide who owned the logs, and such owner to receive the money. This new agreement being entered into by Keith and Polley it was agreed that they should enter into arbitration bonds, the money to abide the event of the arbitration thereunder. It was understood that Keith was to return home and come to St. John in about ten days, or soon after the King's County Circuit, when the attorney of Polley, and Mr. Skinner, the attorney of Keith, could attend to preparing the arbitration bonds. Polley, in consequence of this arrangement, did not proceed to replevy the logs. On the 24th July Keith informed the defendant that he would not arbitrate, and the six days having expired he claimed the money in defendant's hands. Defendant informed him that he held the money as trustee between Polley and Keith, and he would not pay until the arbitration agreed upon was had, as Polley had under the agreement forborne to issue a replevin.

The learned Judge directed the jury that by the agreement of the 9th July, the money paid into Skinner's hands by Hanson would be the intestate Keith's if replevin was issued within six days, unless a new agreement was made between Keith and Polley, and Polley's situation was altered; if so, the new agreement would supersede the first one. The question was for the jury; if there was a new or substituted agreement the defendant was entitled to a verdict. If the jury found there was no substituted agreement, by the one of the 9th of July the plaintiffs were entitled to recover the money. The jury found the substituted agreement.

A rule *nisi* was obtained on the ground of misdirection, it being

contended that Keith could revoke the submission to arbitration, which he did, and that the parties would be recalled, their original rights under the first agreement, and Polley not having replevied within the six days, Keith was entitled to the money.

We think Keith could not revoke the submission after having entered into it and thereby rescind the agreement so as to alter Polley's rights. Before the breach of the first agreement a new agreement is entered into, varying the contract in an essential part by altering the tribunal to settle the right in the logs and establish to whom Skinner should hand over the money. The latter, then, is a substituted contract and is an answer to an action in the former. In Taylor *v.* Hilary (1 C. M. & R. 742) the Court says: Before the breach of the first agreement a new agreement is entered into varying the contract in an essential part, the time of payment, the latter, then, is a substituted contract and is an answer upon the former. In this case Keith and Polley, during the six days that Polley was to replevy, made a new arrangement and agreement in lieu of the first, and by this substituted agreement the rights of the parties must be determined.

Rule discharged.

THOMAS *v.* MCLEOD and others, executors of WILLIAM MCLEOD, deceased.

OCTOBER 30, 1869.

M made a promisory note payable to his own order, which he endorsed and gave to his son-in-law, S, as a gift by way of advancement to his daughter, the wife of S. After it was overdue S transferred it to plaintiff for a valuable consideration.

Held, That the first consideration was not sufficient and that plaintiff having taken it when overdue all equities attached.

Assumpsit on a promissory note for $1.200 tried before WELDON, J., at the St. John November Circuit. The note was drawn by the late Wm. McLeod, in his lifetime, payable to his own order, endorsed by him and delivered to George Stymest, who, when it fell due, took it up and afterwards transferred it to plaintiff for a valuable consideration. Stymest was McLeod's son-in-law, and proved on the trial that the note had been given to him as a gift by way of advancement to his daughter, Stymest's wife, there being no valuable consideration for the note. A verdict having been found for plaintiff,

Wetmore, Attorney General, in Hilary Term, obtained a rule *nisi* for a new trial on the ground (*inter alia*) that the note was a gift, and being without consideration could not be recovered.

C. W. Weldon shewed cause in Trinity Term, contending that the consideration of natural love and affection was sufficient, and the note being given by way of advancement to the daughter of the maker might be recovered on.

S. R. Thomson, Q. C., contra. There is clearly no consideration for this note; it is merely a gift, and the plaintiff having taken it after it was overdue was put upon his inquiry and takes it subject to all equities.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

This was an action on a promissory note drawn by Wm. McLeod, payable to his own order, endorsed by him and delivered to George Stymest, who, after the note fell due, took it up and subsequently transferred it to plaintiff for a valuable consideration. Stymest had married the defendant's daughter and on the trial proved that the note had been given to him by the late Wm. McLeod in his life-time, as a gift by way of advancement to his daughter, Stymest's wife. The consideration alleged in this case is not sufficient to sustain a contract. It is an undoubted rule of law at the present day that a mere moral consideration cannot support an *assumpsit*. The consideration of blood or natural love and affection, though for some purposes a good one, will not suffice to sustain a promise and does not apply to simple contracts; and the general principle which governs other simple contracts applies also to bills of exchange and promissory notes, namely, that *ex nudo pacto non oriter actio*. It is essential to a gift that it goes into effect at once, a gift *inter vivos* by a note or promise not under seal is not a present gift but a mere promise without a consideration, if it is paid in due course it becomes a completed and irrevocable gift, till then it is only a simple executory contract with no consideration to support it. The note in this case having been transferred to plaintiff after it was over-due all equities attach. He cannot recover, it being open to the defendants to avail themselves of the want of consideration as against him, in the same manner that they could have done had the action been brought in the name of Stymest.

Rule absolute for new trial.

LINGLEY *v.* SMITH.

OCTOBER 25, 1869

Plaintiff and M. built a vessel, of which defendant became master, purchasing a sixteenth from M. and a sixteenth from plaintiff, which he did not pay for. The vessel being in difficuties at Boston, U. S., and $1,240 due defendant for wages, he, in consideration of $1,000, by deed of sale transferred to plaintiff all his right in the vessel, and released all claim on account of wages.

Held, In an action to recover the price of the sixteenth, that parol evidence was admissible to prove that the plaintiff, at the time of the deed being executed by defendant, verbally agreed to renounce all claim to the purchase money.

This was an action to recover the purchase money of one-sixteenth of a vessel called the Julia Lingley, tried before FISHER, J., at the St. John May Circuit. The vessel was built in the spring of 1866, by the plaintiff and one McLean, and the defendant was appointed master and became the purchaser of one-sixteenth from plaintiff and a sixteenth from McLean, but did not then pay for the share purchased from the plaintiff. The vessel sailed to Glasgow, from thence to South America, and finally arrived at Boston, U. S., where she was libelled in the Admiralty Court, and sold to pay the seamen's wages, a balance of $5,489.75 being left for the owners, which the plaintiff received. At this time the gross earnings of the vessel amounted to $16,640, of which the defendant received no part, and $1.240 was due him for wages. While in Boston, he executed a deed of sale, by which, in consideration of $1,000, he conveyed to Lingley all his interest in the vessel, all his right and interest in her earnings, and released all claims for wages. Defendant proved that at the time of executing this instrument, the plaintiff orally agreed to release him from all claims in repect of the purchase money of the vessel. This last evidence was objected to by the plaintiff's counsel on the ground that it was inconsistent with the written agreement, but was received by the learned Judge, and a verdict rendered for the defendant.

C. W. Weldon, in Trinity Term last, obtained a rule *nisi* for a new trial on the ground that this evidence was improperly received.

F. A. Morrison now shewed cause. The parol evidence does not alter or vary the terms of the deed, for the deed was executed by the defendant alone to transfer to the plaintiff his share of the vessel, and release all claims upon her, and all that it purports to do it has done. Neither does it vary the consideration, for the defendant does not attempt to deny that he received the $1,000, but merely proves that the transfer by him of the vessel was in consideratton of the plaintiff releasing him from payment of the purchase money. Even if this parol evidence sought to vary the consideration I submit that

it is admissible, for evidence which varies the consideration of a written instrument does not necessarily affect its operation, especially in the case of a deed of sale. Mildmay's case, (1 Coke, 416), Rex v. Scammondan, (3 T. R. 474), and Bishop v. Robinson, (*ante* 68), lately decided in this Court. The consideration named in a deed does not operate as an estoppel. therefore it is open to a party to a deed to go behind the consideration there set out. Duchess of Kingston's case, (2 Smith, L. C., 710). A deed of sale is the execution of the contract of sale, but it is not the contract. It is quite competent for defendant to give evidence of a contract collateral to the written agreemeut. Lindley v. Lacy, (35 L. J. 7), is on all fours with this case. There, Erle, C. J., said, "The question is, does it appear from the written agreement, that it was meant to contain all that was intended to be binding between the parties, if so, nothing can be added to it." But here there is no agreement mutually binding, and, therefore, it cannot be said that the written instrument contained the whole contract. On all principle and authority, the evidence was clearly admissible, and the rule should be discharged.

Duff, Q. C., contra. It is not necessary to cite authorities to shew that, as a general proposition of law, parol evidence cannot be admitted to contradict, alter or vary a written agreement. There are, indeed, exceptions to this rule, but the present case does not come within any of them. There is an evident inconsistency between the two contracts, for if the deed was given for a final settlement, how can the matter be opened up now by parol? [RITCHIE, C. J.: The strong point, to my mind, against you is that the transfer of the vessel was required by statute to be made in writing, in a certain way, and the fact of such a transfer being made by deed, is not inconsistent with there being another matter with reference to which they had agreed.]

RITCHIE, C. J.—While I would be extremely sorry to break down the wholesome rule of law, that a written contract cannot be contradicted by parol testimony, I would be equally sorry to break down the rule that a written contract can be supplemented by parol evidence. In this case, under the registry acts, the vessel could only be transferred by defendant to plaintiff by means of a written instrument. The defendant swears that at the time he made this transfer by deed of sale, the plaintiff agreed to release him from the claim he had against him on account of the price of his share in the vessel. There is certainly nothing in this statement of defendant inconsistent with the deed. Defendant performed his part of the contract, which was to transfer the vessel, and it is only right that the plaintiff should do what he agreed to do, which was to abandon

and release his claim to the purchase money. He is not in a position to recover what he has agreed to abandon. I am of opinion that the evidence was properly admitted.

ALLEN, J.—I cannot see that in this case the parol evidence in any way contradicts the deed. Malpas v. the London and South Western Railway Company (L. R., 1 C. P. 336) is a much stronger case than this. Parol evidence is admissible where it does not contradict, but merely supplements the written contract.

WELDON, J.—I am of the same opinion.

FISHER, J., concurred.

Rule discharged.

McLEOD v. CARMAN and others.

OCTOBER 30, 1869.

It is not competent for a party who indorses a note, and delivers it to a bank, to set up as a defence that the signature of the maker was forged.

In an action by a *bona fide* holder, against the indorsers of a promissory note, a notice of defence that the indorsement was made by one of the partners, in the name of the firm, without the sanction of the rest, and that the note was unconnected with the business of the firm, was held to be bad.

In an action against the indorsers, a notice of defence that the holder of the note before it became due had released the indorsers from all actions and causes of action, judgments, bills, notes, accounts, claims, and demands, at law or in equity was held to be good.

This was an action on a promissory note against the defendant and B. Lingley, who is not brought into Court, as indorsers under the name and style of Carman & Co. The note was made by Oswell and Albert T. Smith in favor of Carman & Co., and indorsed by them. There were two notices of defence. 1. That the note was not made by O. & A. T. Smith, as alleged, but was feloniously forged by one of the defendants, Lingley, without the knowledge of the others, and fraudulently issued by Lingley and not made, issued, indorsed or negotiated for matters connected with the business of the firm of Carman & Co.; that notice was given to the Commercial Bank who were then holders of the note, and that the plaintiff took the note, after it became due, subject to all equities. 2. That before the note became due Lingley indorsed the notes to the Commercial Bank, and they being holders of the note and entitled to demand the money in the declaration mentioned, released Lingley from all actions and causes of action, judgments, bills, notes and accounts, claims and de-

mands, whatsoever, both at law or in equity, or otherwise howsoever, which against him the bank then had or ever had from the beginning of the world to the date, and thereby released him from all promises in the declaration mentioned, and plaintiff obtained the notes after the same became due, and after the release.

C. W. Weldon, in Trinity term last, moved to set the notices of defence aside on the ground that the facts set out in them, if true, were no defence to the action. 1. An indorser is precluded from denying the signature of the drawer. (1 Taylor Ev. 780). McGregor *v.* Rhodes (6 E. & B. 266); Chitty *v.* Hawkins (Holts N. R. 650). That case is quite conclusive, and they having indorsed the note are precluded from saying that it is not genuine. Cooper *v.* Meyer (10 B. & C. 468). 2. With regard to the other notice there is no doubt that a release to one party is a release to all, that if Lingley could take the benefit of that release all the others could also, but this was not a liability which had then accrued but a contingent liability. It depended on three facts: 1. The due presentment of the note; 2. The failure of the drawers to pay, and, 3, due notice to defendants. Can a contingent liability such as this be released? [RITCHIE, C. J.: Why not?] I contend that the release can only apply to an existing liability. [RITCHIE, C. J.: If a man agrees to release another from all claims, on bills, or notes, of any kind whatsoever that he has against him, does it not cover notes, not then due?]

S. R. Thomson, Q. C., contra. I contend that as a point of practice this objection should have been raised at *nisi prius*. I treat it as a plea. [RITCHIE, C. J.: Are you not benefitted by this course being pursued]? I do not put it as a matter of convenience, but whether this objection can properly be brought up in this way. [RITCHIE, C. J.: We will look at the practice on this point.] I will take the second point first, with reference to the release. In the first place the terms of the release in a notice are never put forward with that technical accuracy which is in the document itself, and the Court will not shut out our plea. But the words here, I contend, are sufficiently technical to cover the ground, It states that the bank released Lingley from all manner of actions and causes of action. The meaning of this can only be that he is released from all his liabilities on bills and notes as drawer or indorser. The liability of the drawer of a bill is precisely that of the indorser of a note, and this release was intended to release him from all claims on account of either. As to the other point we say that O. & A. T. Smith did not draw the note. [RITCHIE, C. J.: Are you not met by the fact of that not being a traversable allegation]? Yes, but we go further, we say our partner Lingley forged the note, he was only

authorized to bind his partners as to matters arising on the business. He had no right to endorse this note, the bank had notice of this, and took it with a fraudulent indorsement. I contend that Lingley having made this indorsement withont the authority of the firm had no power to bind them.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.*

This was an application to set aside the notices of defence on the ground that the facts set out in the notices, if true, did not amount to a defence. The declaration was against the defendants, as indorsers of a promissory note. Two answers were proposed to be given to the action under the notices: 1st. That the note sought to be recovered was not made by Oswell Smith and Albert T. Smith, or by the firm of O. & T. Smith, as alleged, but was feloniously forged by one of the defendants, Lingley, without the knowledge of the others, and fraudulently issued by Lingley, and were not made, issued, indorsed or negotiated for any matters connected with, or relating to, the business of the firm of Carman & Company, or with the authority or permission of that firm. That notice of such forgery and fraudulent proceedings was given the Commercial Bank, who, at the time of such notice, were holders of the note, and that thereafter, and long after the note became due, the plaintiff took the note subject to all equities attaching thereto. 2nd. That before the note became due and payable, B. Lingley indorsed notes to the Commercial Bank, and the bank, being the holders and entitled to demand and claim the moneys in the declaration mentioned, by writing made, had released, and forever quit-claimed the said B. Lingley from all and every manner of action or actions, cause and causes of action, judgments, bonds, bills, notes, accounts, claims and demands, whatsoever, both at law and in equity or otherwise, howsoever, which against him, the bank then had or ever had from the beginning of the world to the date, and thereby released him from the promises in the declaration mentioned, and plaintiff took and obtained the note long after the same became due, and after the making of the said writing of release.

This first notice is a sort of double answer to the claim: first, that the drawing of the note was a forgery by Lingley, and secondly, that it was indorsed and negotiated fraudulently by him for matters not

*Ritchie, C. J., Allen and Weldon, J. J. The Chief Justice in delivering judgment said that Mr. Justice Allen, in consequence of indisposition, had not been able to give that attention to the last point, with reference to the release, he would have wished. He, however, assented to the judgment on this point, though with hesitation. Mr. Justice Fisher took no part in the judgment.

connected with or relating to the business of the firm of Carman & Company, or with the permission and authority of that firm. If the indorsement is good defendants are clearly estopped from averring that the note was not properly drawn, that is, from traversing the fact of the drawing *moda et forma*, for when they indorsed and delivered the note to the bank they, by so doing, represented the note as properly drawn, and affirmed its genuineness which they cannot now be permitted to deny. This McGregor *v.* Rhodes (6 E. & B. 266), and abundance of other authority, clearly establishes. Is there, then, anything alleged in the notices to shew that the immediate indorsement is invalid, that indorsement being clearly traversable? All that is alleged is that the note was not made and indorsed or negotiated for any matters connected with or relating to the business of the firm of Carman & Company, or with the authority or permission of that firm. By the custom of merchants well established at law by a long series of authorities, if one partner in trade draw, accept or indorse a bill, cheque or note in the name and seemingly on the behalf of the firm, such act will render all the parties liable to a *bona fide* holder, although the instrument had no relation to the joint trade, and the other partners were wholly ignorant of the transaction, and were even intentionally defrauded by their partner. If, then, the Commercial Bank were the *bona fide* holders of this note, and which they must be assumed to be in the absence of any allegation or suggestion to the contrary in the notice, then they had a right to recover thereon or to transfer it to plaintiff, and by such transfer plaintiff stands in their stead clothed with all the rights they possessed; no equities attaching he is as much entitled to recover on the note as they would have been had they continued to hold the note and had sued on it in their own name, therefore, this notice is, in our opinion, bad.

As to the second notice. Why should this release not operate to discharge this note, treating it as a mere release of ordinary contracts? The bank are the holders of the note, and are, therefore, possessed of a distinct right on an existing obligation. It is true the time of payment had not arrived and the contract is therefore executory. Why may the bank not discharge this right which is to come into effect and operation hereafter? It is an existing obligation or contract between the parties. What is to prevent the party in whose favor such obligation or contract is made from releasing all claims and demands thereunder, and why should such release not be a valid bar to any suit, which may be afterwards brought on such obligation or contract? It is merely *debitum in præsenti solvendum in futuro*, which a release of all actions or demands would operate to discharge. This release is under seal. Now a contract not under seal, verbal or

written, may before breach be discharged by parol, but after breach a discharge must be by release under seal, unless it operates as an accord and satisfaction. But this is a promissory note, and this case is, if possible, much stronger, for it may be discharged at any time by parol. In Foster v. Dawber, (6 Ex. 839), Parke, B., says: "It is competent to both parties to an executory contract, by mutual agreement without any satisfaction, to discharge the obligation of that contract. But an executed contract cannot be discharged except by release under seal or by performance of the obligation as by payment where the obligation is to be performed by payment." Parke, B., then goes on to shew that this rule does not apply to bills of exchange or promissory notes, an obligation by either of which can by the law merchant be discharged at any time by parol. Of the statement in Bayley on Bills where he says: "To this rule it is said that contracts on bills, which are regulated by the custom of merchants, form an exception, and the liability of the accepter, though complete, may be discharged by an express renunciation of his claim on the part of the holder." Parke, B., says: "The words it is said are used, but we think the rule there laid down is good law. We do not see any sound distinction between the liability created between immediate and distant parties. Whether they are mediate or immediate parties the liability turns on the law merchant, for no person is liable on a bill of exchange except through the law merchant. * * * "In both these important particulars promissory notes are put on the same footing as bills of exchange by the statute of Anne, and therefore we think the same law applies to both instruments." The words of the release in this case are as large as they very well can be, and sufficiently so to cover this note, unless, indeed, it is absolutely necessary it should be actually specified and identified, for which we know of no authority. If on the trial it should appear that there was any thing in the release or its recitals to shew that the general words used were restrained, and intended to apply only to bills or notes then held by the bank and over-due, such may afford a good answer by way of replication, because general words, however large, may be restrained or modified and controlled by particular words in the recital or other part of the deed, therefore we think this is a good notice.

JONES *v.* FOSTER *et al.*, impleaded with DOWLING.

OCTOBER 20, 1869.

F. and S. D. and B. entered into a partnership for the buying and selling of shingles; F. and S. D. to furnish the capital, and B. to purchase shingles; profits to be equally divided. The shingles to be shipped to F. and S. at Boston, and money provided by drafts drawn by D. upon them; the business in New Brunswick being done under the name of M. & D. Plaintiffs sold goods to D. on the credit of the partnership and took his notes in payment. Held, That the goods being proper for the business of the firm, and sold on the credit of the firm, the other partners were liable, and that as regards contracts with third parties it was of no consequence whether D. had advanced his proper share of the capital or not.

Assumpsit tried before ALLEN, J., at the St. John Circuit, on two promissory notes dated 18th June, 1867, for $651.22 each, drawn in the name of McLean & Dowling, in favor of the plaintiff, payable at three and four months respectively.

The defendant Dowling lived in Fredericton, and had been carrying on the business of buying and shipping lumber to the United States, in the name of McLean & Dowling, and the defendants, Foster & Swazey resided in Boston and carried on the business of lumber merchants, and had had some dealing with McLean & Dowling. In October, 1866, Foster came to Fredericton and saw Dowling, when it was agreed that the three defendants and one Benjamin F. Brown should enter into an agreement relative to the buying and shipping of lumber. The agreement was not actually signed till some time in November. Dowling states that the business was to be carried on in the name of McLean and Dowling; that it was agreed that certain lumber, which Dowling had contracted for before the agreement was entered into, should go into the joint account, and that they should continue on; that he (Dowling) should purchase goods in St. John for the purpose of producing shingles and clapboards, and send them up the River St. John to the parties who were gathering the lumber, that he was to make the purchases on joint account, and that when he had accepted for goods in St. John, which acceptances had not matured, he was to make drafts on Foster & Swazey to realize money for their payment. The agreement was as follows:—

Agreement between McLean & Dowling, of Fredericton, Foster & Swazey, of Boston, and B. F. Brown, of Bangor. After reciting that the said parties had agreed to enter upon an operation embracing the purchasing and selling of shingles and clapboards upon the terms thereinafter mentioned, the agreement witnessed that in the operation McLean & Dowling were to attend to the business at Fredericton, if necessary assorting, piling, and re-shipping all shingles and clapboards, and to receive for their services *all expenses on account*

of same, including wharfage at the rate of fifteen cents per M., in gold, for all shingles, and for clapboards, six cents per M. for wharfage. Also all actual costs and expenses of receiving, assorting, piling, and re-shipping clapboards, Brown to devote his time for the interest of all parties in purchasing shingles and clapboards, without any charge except for horse, for travelling stage fares and labor hired for the benefit of the operation which are chargeable to it. Foster & Swazey to control all sales of shingles and clapboards, purchased on joint account, and all proceeds of sales were to come to them. They to keep the accounts of the business and to receive on all sales 28½ per cent., guaranteeing to make no other charge for services except for actual expenses paid out on account of same. If unable to make sales, and should they have to wharve and store at their sheds, six cents per M. per month, on shingles and on clapboards, *pro rata*, American currency, this charge to include expense of piling. The shipments from Fredericton to be made as Foster & Swazey may direct. If McLean & Dowling can sell at Fredericton to better advantage to have the right with Foster & Swazey's approval to make such sales. The shingles and clapboards purchased under this agreement declared to be joint property of, and as purchased for, Foster & Swazey and McLean & Dowling, the capital required for the operation to be furnished equally by McLean & Dowling and Foster & Swazey, on which interest is to be charged. Profit or loss to be equally divided, one-third to McLean & Dowling, one-third to Foster & Swazey, and one-third B. F. Brown. All shingles and clapboards contracted for and purchased in view of this agreement, and all to be thereafter contracted for, and purchased thereunder, to be for the interest of the parties as therein mentioned. By consent of the parties to it this agreement was left in the hands of Mr. Fraser, at Fredericton. After this Dowling went on purchasing shingles and clapboards, which were paid for partly in goods and partly in money, obtained principally, if not altogether, on drafts drawn in the name of McLean & Dowling upon Foster & Swazey.

The plaintiff had dealt with Dowling for two or three years before this joint agreement was entered into, and in January, 1867, Dowling's indebtedness to him was large. He went to Fredericton and saw Dowling, who told him of the partnership between him and Foster & Swazey, and said he should want some goods; that principally all the business he was doing on the river was a joint business with Foster & Swazey; that Mr. Fraser knew all about the business between them, and he referred him to Mr. Fraser. The plaintiff then went to Mr. Frazer, who told him that there was a partnership between Foster & Swazey and Dowling; that they were buying and shipping lumber, and he believed they were perfectly good. The

plaintiff did not ask the particulars of the agreement, and Fraser did not inform him. The plaintiff stated that from this information and other causes he was led to make further advances of goods to Dowling. There was no charge in his books, the goods being charged to McLean & Dowling, because the plaintiff said he understood the business was carried on in that name. These notes were given by Dowling for goods furnished by the plaintiff on Dowling's order, and which goods, he stated, went to parties who were getting lumber on the joint account. Dowling shipped lumber to Foster & Swazey under the agreement, and made drafts on them to a larger amount. He also shipped some lumber to one Ezra D. Fogg, of Providence, by consent of Foster & Swazey, and drew upon him for a large amount; but in July, 1867, Foster & Swazey, having lost confidence in Dowling, and believing that he was violating the agreement, filed a bill in equity and obtained an injunction to restrain Dowling from making any further shipments to Fogg. All the drafts drawn by Dowling either on Foster & Swazey, or on Fogg, were drawn in the name of McLean & Dowling; and in fact there was nothing to shew that in the joint operation Dowling dealt in or used any other name than McLean & Dowling. After the agreement was entered into, Foster & Swazey kept the accounts in their books. "*McLean & Dowling, Joint Account.*" Before this their accounts with Dowling were kept in the name of "*McLean & Dowling.*" A good deal of evidence was given by the defendants to shew that Foster & Swazey had advanced much more than their proportion of the capital for the business, and that Dowling had not advanced his proportion, but there was nothing to shew that the plaintiff had any knowledge of this, or of the state of affairs as between the individual partners. The learned Judge on the trial directed the jury that the first question was whether the plaintiff had furnished the goods on the sole credit of Dowling, or on the credit of the three defendants. If on the credit of Dowling alone, the verdict must be for the defendants. That the agreement of the first November constituted the three defendants partners in the particular business in which they were engaged, and each was a principal and each an agent for the other, and each was bound for the contracts of the other made for carrying on their trade, and whatever was necessary for either of the parties to do in order to carry out the objects of the business they had power to do. Then the question was, were the goods, for payment of which the notes were given, necessary and proper for the purpose of carrying on such a business as the three defendants were engaged in? If they were, and there was no collusion between the plaintiff and Dowling, Foster & Swazey would be liable. That it was of no consequence whether Foster & Swazey had advanced more

than their portion of the capital and Dowling had not advanced his portion, that was a matter between themselves with which third parties had nothing to do. That it was not the plaintiff's duty to inquire into the particular terms of the partnership; though if he knew that Dowling, in purchasing the goods in the joint name, was violating the partnership agreement, he could not recover. As to Foster & Swazey being bound by the notes, the learned Judge said if the goods were necessary and proper for carrying on the joint business, and Foster & Swazey had recognized Dowling's right to draw bills in the name of McLean & Dowling, they would be liable on the notes. He referred to Dowling's evidence, and to the manner in which Foster & Swazey kept the joint account in their books, and also to the manner in which Dowling drew on Foster & Swazey, as to the name of the firm. The jury having found a verdict for the plaintiff,

Travis, in Hilary Term, obtained a rule *nisi* for a new trial, on the following grounds: Improper admission of Dowling's evidence. 1st. In stating that he was carrying on a joint business with Foster & Swazey, and that such business was carried on in Fredericton, under the name of McLean & Dowling. 2nd. In stating that he was in the habit of purchasing goods for such business from parties in St. John. 3rd. Improper admission of evidence of conversation between Dowling and Jones and Fraser before the sale of the goods, and as to when the credit was given. 4th. Of the evidence of arrangements made between him and Foster & Swazey before the agreement was signed; that he was to make purchases of goods in St. John on joint account, and when payments came due to draw on Foster & Swazey at sixty and ninety days, and that they were to pay the drafts; also that he was to give notes at ninety days, and when due, draw on Foster & Swazey at one hundred and twenty days, and send the proceeds up the river to buy shingles on joint account.— Misdirection in telling the jury. 1st. That there was a partnership under the agreement which gave Dowling power to bind Foster & Swazey for goods purchased by him for the purpose of getting out shingles on joint account. 2nd. That it was immaterial in this action whether Foster & Swazey had contributed more than their share of the capital or not. 3rd. That Dowling had a right to bind Foster & Swazey by drawing joint notes and bills in the name of McLean & Dowling, for the goods bought from plaintiff, if Foster & Swazey had recognized notes and bills drawn in that name. Also that the verdict was against the weight of evidence. The following authorities were cited in moving for the rule: Cox *v.* Hickman, (7 Jur. N. S. 105, S. C. 9, C. B. N. S. 47). Kilshaw *v.* Jukes, (Jur. N. S. 1231). Ex parte

Darlington v. Stockton Bank Company, (11 Jur. N. S. 122). Bullen v. Sharp, (12 Jur. N. S. 247). Smith v. Craven, (1 Cr. & Jer. 500). Nicholson v. Ricketts, (2 Ell. & Ell. 496). Story on Partnership, (81 & 75). Collyer on Parnership, (5 Am. Ed. 5, 6). Donnally v. Ryan, (2 Am. L. R. 312). Heap v. Dobson, (15 C. B. N. S. 460).

A. L. Palmer, Q. C., shewed cause in Easter Term. As to the first point of improper admission of evidence, where there are articles of partnership in writing in an action not between the partners, it is quite competent to prove it by parol evidence. 2 Greenleaf Ev. § 483, 2. Evidence of the acts of partners cannot be excluded. In order to fix the liability of Dowling it was necessary to shew what he did, and if we shewed that the other defendants recognized his acts, it was surely proper evidence. The acts or declarations of either of the defendants were proper to be admitted. 3. We did not seek to vary the contract by parol evidence; we only say that they having made a contract with plaintiff, he had nothing to do with the contract as between themselves. Plaintiff did not trust to Dowling, but took care to sell on the credit of Foster & Swazey and Dowling; surely in making the contract plaintiff had a right to say to whom he gave the credit. 4. The declarations of any of these parties with reference to goods purchased on joint account cannot be shut out. Before the agreement was signed they discussed the mode of applying the capital to the purchase of shingles, and Dowling was told that money could be raised by drawing in the name of McLean & Dowling upon Foster & Swazey, and the agreement states that all the shingles purchased previously shall be for the joint interest of all parties. But how is evidence of the shingles thus purchased to be given unless the declarations of these parties are taken? There is nothing to prevent us from shewing that although we entered into the agreement we previously were authorized by Foster & Swazey to purchase these goods on joint account. As to the points of misdirection. 1. The learned Judge told the jury that the agreement shewed a partnership, and if the purchase of these goods was fairly within the scope of the business, the defendants were liable; otherwise they were not. This direction was right. We shewed that the purchase of these goods was within the scope of the business. Parties agreeing with each other to carry on a joint business confer upon each other all the powers necessary to carry on that business, and cannot be limited as to third parties by any secret agreement. Cox v. Hickman, (9 C B., N. S. 47). We having got the transaction within the scope of the partnership, nothing further need be shewn. What is the test of the liability of partners? Does a man go to purchase articles for three people on an agreement that the articles shall vest

in the three, and that he alone shall be liable to pay? That would be an absurdity, and such a case cannot be found. All the partners are liable to pay the partnership debts. Parsons, 125. It was shewn that the account of McLean & Dowling stood on Foster & Swazey's books as on joint account. 2. The Judge was clearly right in saying that as between third parties it was immaterial whether Foster & Swazey had advanced more than their share of the capital or not. 3. So also as to this point, the notes drawn in this way having been recognized by Foster & Swazey, and these notes being for the purposes of the partnership, surely that was sufficient. As to the evidence, the weight was all in our favor, and shews that all the transactions were for partnership purposes. Foster & Swazey consented to let McLean & Dowling ship to Fogg at Providence, and Fogg agreed to allow them to draw on him, and there is a letter in evidence of 8th July, 1867, from Foster & Swazey to McLean & Dowling, asking for a statement of the shingles sent to Providence on joint account, and the drafts drawn on Fogg on joint account.

Travis, contra. The true rule in regard to partnership is that the contract of partnership is merely the contract of agency as stated in Story on Part., § 1. The contract in this case is in writing and cannot be contradicted by verbal testimony, such as the evidence of Dowling, as to what the agreement was. [RITCHIE, C. J.: The contract relied on here is the one between Foster & Swazey, Dowling & Jones, but you argue as if it was merely between Foster & Swazey and Dowling.] My contention is that after an agency is shewn on the part of Dowling to bind Foster and Swazey you can only find them to the extent of the agency. If they attempt to recover in consequence of a partnership set out by a written agreement they cannot set up that which is not in the written agreement. [ALLEN, J.: You argue as if Jones claimed under the written agreement, which he does not, he claims under the contract.] I contend that the written agreement shews the whole contract. Foster & Swazey never assented to any such contract as that made with Jones. The statements of Jones, made in reference to conversations with Dowling and Frazer, are not admissible, because it is not shewn that they had any authority to bind Foster and Swazey. [RITCHIE, C. J.: It all comes back to the question whether the ruling of the learned Judge in regard to the contract was right or not.] Partnership being a branch of the law of agency the agreement in this case gives no authority to bind Foster & Swazey by the acts of Dowling, or the purchase of goods from different parties. In Cox *v.* Hickman, Pollock, C. B., lays down the doctrine that the agreement and intention of the parties should govern the cases even towards third parties

who were not aware of the agreement. If this position can be established the plaintiff cannot recover, for the intention that Dowling should bind them by purchase is completely ignored. No part of the evidence shews a recognition by them of Dowling's right to use their name and bind them by contracts. The case of Nicholson v. Ricketts, (2 E. & E. 496), is similar to the present, only stronger. The name of McLean & Dowling was never adopted by Foster & Swazey as the partnership name by which they would be bound. The shipments to Fogg originated in a letter from McLean & Dowling to Foster & Swazey of 1st February, 1867, in which Dowling speaks of financial troubles and wishes to get $20,000 from outside parties, giving shingles as security. On 18th February Foster & Swazey reply, declining to do this themselves, but saying that Fogg will advance the money, and shipments were made to him. McLean & Dowling's name was taken by Jones on the notes, and the account thus entered on his books just as it had been years before; the heading in Foster & Swazey's book was "McLean & Dowling joint account;" the names on the drafts were McLean & Dowling. This was not a recognition of the power of "McLean & Dowling" to bind by their name Foster & Swazey. Smith v. Craven (1 Cr. & Jer. 500). [RITCHIE, C. J.: If Dowling's statement is true in regard to his being authorized by Foster & Swazey to buy goods on joint account can there be a doubt as to their liability?] Dowling's agency being limited and defined strictly by the agreement he is in the position of an agent merely, and cannot go beyond his authority.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

(After stating the facts as given *supra*.) What does the agreement between these parties amount to but simple articles of partnership whereby these parties entered on a joint operation, to use their own words, "embracing the purchasing and selling of shingles and clapboards, upon the terms therein mentioned," two of the partners supplying the capital on which they were respectively to be allowed interest, and the third party "devoting his time for the purchasing of the shingles and clapboards," without any charge except certain actual expenses which he might incur. The profit or loss of the business to be equally divided. Beyond this the agreement, after declaring that the property purchased on joint account was to be the property of, and as purchased for Foster & Swazey and McLean & Dowling, a clause inserted, no doubt, in consequence of their undertaking to supply the capital, merely contains stipulations regulating the conduct of the business as between themselves, viz., as to what portion of the business McLean & Dowling were to attend to at

Fredericton, and what they were to receive therefor, and giving the control of sales to Foster & Swazey and fixing their remuneration on such sales, &c. No doubt in this case the real and substantial question is with whom was the contract made? Were these goods furnished for the use of all, at the instance of all? That is, had the party Dowling, through whose instrumentality the contract is alleged to have been made in fact, authority, expressed or implied, to pledge the credit of his partners? This may be proved by shewing that such a relation existed between the parties as would create the authority. Here, then, these parties have, by the partnership agreement, established a relationship between themselves, whereby each has constituted in law the other his agent for all purposes necessary for carrying on, or usually belonging to, an operation such as this on their joint account, and for their joint benefit, the authority for one to act for the other being created by law to this extent out of the partnership relation, a contract entered into by an individual member of the firm, binding the firm with reference to business transacted by it, and in the absence of collusion between himself and the other contracting party; on the simple principle that one member of a firm is the accredited agent of the rest. Parties as between themselves, may, and often do, exclude the relationship of partnership from arising as between themselves, but an attempt by such an arrangement to affect the rights of third parties is a very different matter, and however valid, as between the members of a trading company, a private regulation to limit their personal liability may be, *quoad* strangers, it is perfectly inefficaceous. In Cox v. Hickman (7 Jur. N. S. 105), Lord Cranworth says: "The liability of one partner for the acts of his co-partner is, in truth, the liability of a principal for the acts of his agent. Where two or more persons are engaged as partners, in an ordinary trade, each of them has an implied authority from the others to bind by all contracts entered into according to the usual course of his business in that trade. Every partner in trade is, for the ordinary purposes of the trade, the agent of his co-partner, and all are therefore liable to the ordinary trade contracts of the others. Partners may stipulate among themselves that some of them only shall enter into particular contracts, or into any contracts, or that as to certain of the contracts none shall be liable except those by whom they are actually made; but with such private arrangements those persons dealing with the firm, without notice, have no concern, the public have a right to assume that every partner has authority from his co-partner to bind the whole firm in contracts made according to the ordinary usages of trade. This principle applies not only to persons acting openly and avowedly as partners, but to others who, though not so acting, are by secret or

private agreement, partners with those who appear ostensibly to the world as the persons carrying on the business."

In the case these parties do not appear to have attempted to limit their liability in any way, and it is difficult to understand how they can expect to escape from liabilities on all contracts fairly and properly entered into by either of the partners within the legitimate scope of the operation for joint benefit, and for the purpose of carrying it on in a manner usual and customary in undertakings of that character. The operation was not to be carrird on by one of the partners alone, as between themselves they had arranged that certain portions should be conducted by each of the three parties; but in the general management of the business there is nothing to shew that either was to have a controlling influence. Thus Brown was to make the purchases, but could he, therefore, buy and contract independent of, and purchase against, the wishes of the others, and without their right to interfere in any way, was he to buy for cash alone? Were no contracts to be entered into or liabilities incurred? The very agreement itself shews this was not so, because contracts had actually been made before the agreement was signed, and which, by its terms, are to go for the benefit of the joint account, and can it be that if Brown contracted for the purchase of shingles for joint account, and for the purpose of the joint operation, the others would not be liable for them, and if the course of such business was to contract for the manufacture of the articles, and to supply the actual operator from time to time to enable him to fulfil his contract, as we have all had judicial experience enough to know is the course of dealing, with reference to lumbering operations, can it be contended that if one of the partners, without collusion, in the fair and *bona fide* exercise of his rights as a partner, purchases on the credit and for the benefit of the firm, goods with which to supply the parties contracting to sell, and deliver to the firm, and shingles are accordingly delivered, and the firm gets the benefit of them, that any of the individual members of the joint arrangement can receive his share of such benefits, and repudiate the contract of his co-partner, by means of which the benefit was secured or obtained, and that, too, in the ordinary course of dealing in transactions of such a nature? Clearly, whatever Brown did under the agreement was for the benefit of the three parties to the contract, so what McLean & Dowling, and so what Foster & Swazey did. In Heyt *v.* Burge (9 C. B. 458), Creswell, J., says: "It has been decided in so many cases that an agreement between the parties to be jointly interested in the profits of one transaction constitutes a partnership, and authorizes them to do all that is necessary to obtain profits, as usual in such matters, that the rule cannot now be shaken." If these goods had been

obtained by Dowling, on the personal credit of McLean & Dowling, for the purpose of enabling them to put into the concern their share of the capital, though the goods were used in the joint operation the matter would have stood in a very different position; then they would have been acting for and on their own behalf, and not on behalf of the other defendants. But to say that a contract, *bona fide* entered into, whereby the credit of the firm was pledged by one partner for goods for carrying on the concern, imposed no liability on the other partners, and that they should be permitted to take their share of the profits of the concern, and not be responsible for the debts incurred for the purpose of obtaining the means of realizing profits, would not only be most unjust and unreasonable, but contrary to the simplest principles applicable to the law of partnership. In this case the agreement constituted the parties to it partners, as between themselves, and each one became liable, as such partner *quoad* third persons, for good furnished *bona fide* on the credit of the partnership for carrying on the concern. The real primary substantial business of this operation was to be carried on through Brown, and it could not be so unless McLean & Dowling and Brown were the agents of Foster & Swazey for so carrying it on. Unless shingles and clap-boards were procured here, the operation could have no existence, and with buying or contracting for them, or supplying the contractors to get out the articles, Foster & Swazey in Boston, it is clear, could have, and had, practically, nothing to do; and, therefore, if the concern was to be carried on at all, it could only be done through the instrumentality of the partners in this province who so necessarily became the agents for their co-partners, and this brings the case, it appears to us, directly up to the true test, as enunciated in Cox v. Hickman, where Lord Cranworth says: "It is often said that the test, or one of the tests, whether a person not ostensibly a partner is, nevertheless, in contemplation of law, a partner, is whether he is entitled to participate in the profits. This, no doubt, is in general a sufficiently accurate test for a right to participate in profits, affords cogent, often conclusive, evidence that the trade in which the profits have been made was carried on, in fact, for, or on behalf of, the person setting up such a claim; but that the real ground of the liability is that the trade has been carried on by persons acting on his behalf. Where that is the case he is liable to the trade obligations, and entitled to his profits, or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing that entitles him to the one makes him liable to the other, viz., the fact that the trade has been carried on on his behalf, *i. e.*, that

he stood in the relation of principal towards the persons acting ostensibly as the traders by whom the liabilities have been incurred, and under whose management the profits have been made, and Lord Wensleydale is equally clear. He says: "The law as to partnership is undoubtedly a branch of the law of principal and agent, and it would tend to simplify and make more easy of solution the questions which arise on this subject if the true principle were now more constantly kept in view." Mr. Justice Story lays it down in the first section of his work on partnership: "Every partner is an agent of the partnership, and his rights, powers, duties and obligations are in many respects governed by the same rules and principles as those of an agent. A partner virtually embraces the character of both principal and agent." Pothier says: "*Contractus junctatis non secus ac contractus mandato.*" (Pand. lib. 17, tit. 2, Introduction). A man who orders another to carry on trade, whether in his own name or not, buy and sell, and to pay over all the profits to him, is undoubtedly the principal, and the person so employed is the agent, and the principal is liable for the agent's contracts in the course of his employment, so, if two agree that they should carry on a trade, and share the profits of it, each is a principal, and each is an agent of the other, and each is bound by the other's contract in carrying on the trade as much as a single principal would be by the act of an agent who was to give the whole of the profits to his employer. Hence it becomes a test of the liability of one for the contract of another that he is to receive the whole or a part of the profits arising from that contract by virtue of the agreement made at the time of the employment. I believe that this is the true principle of partnership liability."

Whatever McLean & Dowling were to do in this Province, for and on behalf of the partnership operation, has been done, and was done in the name of McLean & Dowling, and what was done in Boston was done in the name of Foster & Swazey, and under the evidence, we think the partnership was bound by liabilities incurred by Dowling on behalf of the firm, in the name of McLean & Dowling.

We have thus disposed of the substantial question in controversy, and we think there is nothing in the other objections raised. The evidence objected to under the view we take of the law in this case, was, in our opinion, clearly admissible. All we can say in conclusion is that if Foster & Swazey did not intend to be bound by the acts of McLean & Dowling, they entered into a very improvident agreement, and attempted to get the benefits of the business, and escape the legal liabilities which their agreement and the carrying on the business under it necessarily imposed on them. This, we clearly think, they should not do.

The rule must be discharged.

RUEL, CHAMBERLAIN OF ST. JOHN, *v.* HUNTER

OCTOBER 25, 1869.

A New Brunswick volunteer, who re-enrolled under 31st Vict., cap. 40, of the Parliament of Canada, is not entitled to the exemption from City, County and Parish rates and taxes provided for by the Provincial Act, 28th Vict. cap. 1, sec. 17.

This was a special case which set out the following state of facts:—Prior to the passing of the Act of the Dominion Parliament, 81 Victoria, cap. 40, the defendant belonged to a company of volunteers in the St. John Volunteer Battalion, being Company H. of that Battalion. After the passing of the Dominion Act above mentioned, the proceedings provided for in section 7 of that Act were taken, and the defendant was re-enrolled as a volunteer in the same company and battalion. He duly signed the service roll, took the oath, and otherwise complied with all the requirements of the Act. He has been assessed for three dollars and ninety-six cents in the City of St. John, for the year 1869, under "the St. John City Assessment Act, 1859," and the several Acts in amendment thereof, and an execution has been issued against him to levy the amount. The assessment and all proceeding under it have been duly made and taken: but the defendant produces a certificate under the hand of the commanding officer of the said corps, as directed by an Act made and passed by the Legislature of this Province, in the twenty-eighth year of Her Majesty's reign, entitled "An Act relating to the Militia," and he claims to be exempt from the payment of the said sum of three dollars and ninety-six cents, under the provisions of the last mentioned Act. The question for the Court is, whether the defendant, as such volunteer, having complied with all the requirements of the law, and produced the certificate mentioned in the seventeenth section of the last mentioned Act, is now entitled to such exemption or not.

B. L. Peters, Q. C., for the plaintiff. The exemption which the defendant claims is under 28 Vict., cap. 1, sec. 17, which, we contend, is repealed by the Militia and Defence Act of the Dominion of Canada, 31 Vict. cap. 40; Militia and defence being subjects in which the Parliament of Canada has exclusive jurisdiction under the British North America Act, 1867. The Canadian Act requires re-enrollment and substitutes an entirely new militia system, and we contend that every vestige of the New Brunswick Militia Act is swept away. [RITCHIE, C. J.: The burthen and control of the militia is placed in the Parliament of Canada, and to maintain this exemption would be to place a portion of the burthen of the militia on the local authorities. Was the exemption ever intended to apply to more than to

the New Brunswick local militia as then constituted?] That is precisely our contention.

Here Peters was stopped by the Court.

Duff, Q. C. for the defendant. The Canadian Act, 31st Vict., cap. 40, sec. 99, only repeals all Militia Acts of the various Provinces which are inconsistent with it or repugnant to its provisions; but this exemption is neither. If any individual corporation desired to present a uniform annually to each member of the voluneers in the Province, it could not be said to interfere with or be repugnant to the Canadian Militia Act in any way. [RITCHIE, C, J.: But suppose the gift to be to all volunteers enrolled under our Provincial Act, could the volunteers enrolled under the Canadian Act claim it]? [ALLEN, J.: When the defendant enrolled under the Canadian Act did he not cease to be a volunteer under our Provincial Act?] That may be so, but I contend that while the British North America Act, 1867, did not repeal our New Brunswick Militia Act, and the Canadian Militia only repeal whatever is repugnant to its provisions, that the section containing the exemption is still in force. [RITCHIE, C. J.: Is there any necessity for the repeal of that section? Does not the Canadian Act wipe out of existence the volunteers for whose benefit the exemption was made?] I contend it does not, for the defendant was a volunteer under the New Brunswick law, and continues to be one under the Canadian Act. [FISHER, J.: Then yon make a distinction between those who re-enrolled and those who first became volunteers under the new Act]. [RITCHIE, C. J.: What makes the defendant a volunteer now but re-enrollment? Do you contend that he would be a volunteer now if he had not re-enrolled?] No. I cannot say that I contend that. Sec. 7 of 31st Vict., cap. 40, which provides for re-enrollment, recognises and makes allowance for the volunteer's continuous service in the same corps under the local militia law, and considers it no part of his term of service under the new Militia Act for the purpose of exempting him from being balloted for as one of the active militia. [RITCHIE, C. J.: I think the Canadian Militia Act has repealed the whole of the New Brunswick Militia Act; if he can claim the exemption why not the pay under the New Brunswick Act?] The corps in which he served still continues under the same name, the officers are the same, there has been no change, except the re-enrollment. [RITCHIE, C. J.: The names of the corps may be the same, but they are under a different authority; the officers may be the same, but they have received new commissions; and the volunteers have ceased to be New Brunswick volunteers and have become Canadian volunteers.] Suppose that before the British North America Act passed, an Act of our Legislature had

been passed entirely changing the organization of the volunteers, the names of the corps and everything else, but leaving the 17th Sect. untouched, could it be contended that the exemption did not remain for the benefit of the volunteers under the new system?

RITCHIE, C. J.—We have no doubt, whatever, about this case. When the defendant re-enrolled under 31st Vict., cap. 40, of the Parliament of Canada, he ceased to be a volunteer under the Militia Act of New Brunswick, and can claim no exemption from taxation as such.

The rest of the Court concurring.

Judgment for plaintiff.

RECTOR, *etc.*, ST. GEORGE'S CHURCH *v.* COUGLE, *et al.*

OCTOBER 30, 1869.

An action for damage done to the church property, in the absence of proof of there being any legally inducted Rector, may be brought in the name of the Church Corporation.

In an action against defendants in the name of the Church Corporation, for boarding up the church windows and doors, the defendants gave as notices of justification that they were church-wardens, and closed the church for repairs. On the trial, one of the defendants admitted that they had closed the church to prevent a clergyman who claimed to be Rector from officiating there.

Held, That in the absence of proof of there being any Rector, the defendants as against the Church Corporation, had no right to dismantle the church even though they were themselves members of the corporation.

Trespass for alleged injuries to the Parish Church of St. George in Carleton, and to the School-house in connection therewith, by taking out the windows and boarding up the windows and doors, so that the same were rendered unfit for occupation. The first count of the declaration charged the breaking into the church, etc., the second the taking away of the windows and doors, the third the turning plaintiffs out of possession. Plea—The general issue and five notices of justification as follows:—

1st. That the rector of St. George's Church, in the Parish of Carleton, died on the 8th December, 1866, and that since that time no person has been legally presented, instituted, appointed and inducted to be rector thereof, and that the benefice was at the time of committing the trespass vacant.

2nd. That any supposed presentation, etc., was not made according to law, or by any person having the right, etc.

3rd. That Cougle and Mayes, two of the defendants, now are, and were at the time, etc., the church-wardens of St. George's Church, and were in lawful possession, charge and control of the church, school-house and premises, and all the supposed trespasses, if any, were committed by them in the lawful, etc., discharge of their duties and rights as such church-wardens; that they made only such noise as they lawfully might, and shut up the church, if at all, for needed repairs and for other lawful causes.

4th. That the church and school-house at the time when, etc., were in lawful possession of Cougle and Mayes as the church-wardens, and that all the other defendants as their servants and at their command committed the several supposed trespasses, if any, as they lawfully might.

5th. That the said Cougle and Mayes and Peters, Noble, Coram, Littlehale, Leonard, Olive, Clark, Neil and Dodge, were at, etc., the church-wardens and vestry of St. George's Church, and were in lawful possession, etc., of church, school-house and premises, and that all the trespasses, if any were committed, were lawful and proper acts, etc., done, etc., by them in the lawful, etc., discharge of their duties as such church-wardens and vestry; that they made only such noise as they lawfully might and closed up the church and school-house, if at all, for the purpose of needed and necessary repairs, and for other lawful causes as they lawfully might; and did only such quiet and proper acts as they lawfully might for the purposes of making such repairs, etc., and for other lawful purposes, which are the supposed trespasses; and that all the other defendants as their servants and at their command, etc.

At the trial before WELDON, J., at the St. John Circuit, it appeared that the then rector of St. George's died in December, 1866, and at that time defendants were the church-wardens and vestry of that parish. The Rev. Wm. Walker, one of the plaintiffs, claimed to have since become rector of the parish, by appointment and induction, but the defendants denied that he had been properly inducted and refused to recognize him as such. The election of church-wardens and vestry, for the parish of St. George, is required by law to be held on Easter Monday in each year, and to be presided over by the rector. There was no evidence given in regard to the election in 1867, but they claim to have acted as and to have been church-wardens and vestry during 1867. On Easter Monday, 1868, the defendants and several other parishioners met in the church for the purpose of holding an election of church-wardens and vestry. The Rev. William Walker, who came to the door, was refused admission, on the grounds that they did not recognize him as rector. The defendants offered

secondary evidence of a notice posted on the church door, prior to Easter Monday, 1868, signed by defendants, and calling a meeting for an election, which notice had been torn down and destroyed. This evidence was rejected by the learned Judge. After the refusal to admit Mr. Walker, the meeting proceeded to elect the defendants church-wardens and vestry, and at a meeting held the same evening a resolution was passed, ordering the church and school-house to be closed up for repairs. The doors and windows were accordingly taken out and boarded up, which was the trespass complained of. It was admitted by Mayes, one of the defendants, that the real reason of closing up the church and school-house was to keep Mr. Walker out and to prevent him from holding services in them. It was contended on behalf of defendants that the induction of the Rev. Wm. Walker as rector not being proved the action could not lie. The learned Judge directed the jury that this being an action in the corporate name it was not necessary to prove the induction, and that the defendants had no right to close up the church and school-house and prevent services being held in them. Verdict for plaintiff.

Wetmore, Attorney General, in Hilary Term, obtained a rule *nisi* for a new trial, on the grounds of misdirection and improper rejection of secondary evidence of the notice.

S. R. Thomson, Q. C., shewed cause in Easter Term. The defendants not having proved that they were elected church-wardens in 1867, did not shew that they were church-wardens or had any right to put notices of the meeting on the church door, and the evidence was properly rejected. As the title to the church property is vested in the rector, church-wardens and vestry, if any injury is done to the freehold they have clearly a right of action. The complaint here is not merely an invasion of the possession of the rector, but of the absolute injury done to the freehold. The notices of justification put in by defendants are no defence to the action, and they would have been demurrable had they been put in the form of pleas. Mayes admits that the church and school-house were closed up not for repairs but to keep out Mr. Walker, so that that plea of justification is gone, and the learned Judge could only tell the jury to find for defendants, which, although a hostile jury, they did, giving one cent damages. The defendants did not prove that they had been legally elected church-wardens in 1867, and there can be no presumption in their favor from their being church-wardens the year before. That being the case, on what principle could the learned Judge have admitted evidence of a notice which it was not shewn they had any authority to give. Besides, there was no plea on the record to justify

such testimony. Where evidence is rejected upon a point, which, if admitted, would not have helped the party, a new trial will not be granted.

A. L. Palmer, Q. C., and *Wedderburn*, contra. Assuming that the title was in the church corporation, the only special plea that would meet the case would be that the freehold being in them we entered by their command. This being the freehold of a third party we can shew under the general issue which we have pleaded. Supposing the fact of their being no rector is a defence, we have proved that and contend that the acts done are such as we had a right to commit and the notice is sufficient.

The evidence of the notice was admissible, as emanating from the only corporation shewn to have an existence. The election of the defendants as such corporation was in evidence, and no other election having been proved, they were presumed to be the corporation; and until other corporations were proved to have been legally constituted, they continued in office. Portland and Lancaster Steam Ferry Company *v.* Pratt (2 Allen, 17). If it can be contended that before the acts of the corporation are admissible it must appear they were appointed at the yearly election preceding, it would be necessary to go further back, and trace down the corporation year after year from the beginning. But under the Act of Incorporation, and the Rev. Statutes having been shewn legally in existence, and no successors appointed, they continued in office. The notices are clearly sufficient. The Act requires that the grounds of defence shall be stated generally, and unless the plaintiffs have been misled, advantage cannot be taken of any mere defect in form. And the form discloses the defences, and the effect of them is clear. The rector is proved to be dead, and no successor has been instituted and inducted, and the churchwardens and vestry necessarily constitute the corporation of St. George's Church, and have all its powers, with the right to use the corporate name if necessary. It follows, therefore, that the alleged acts of trespass were done by the *de facto* church corporation upon the death of the rector, or by their direction and command; they were no trespasses at all, but legitimate acts of the existing corporation, and this action must fail. These acts were not, as contended, in derogation of the rights of any reversioner, but in the proper care and protection of them. All parties admit the church building was a very old one, and in a dilapitated state, and really dangerous as well as disgraceful. Upon the death of the rector the surviving members of the corporation were bound to preserve it. No rector having been appointed after Mr. Coster's death, and they having in themselves all the rights of the corporation, what they did was not

in dispute of the rights of any rector. The plaintiffs should have shewn the presentation, institution, and induction of a rector, and that he and other corporators had been duly appointed. Without this they had no right: they were trespassers. If the defendants were the acting corporation at the time of the proceedings complained of, and the alleged wrongs were usual and necessary acts preparatory to making needed repairs, the notices are themselves sufficient, and the public notice which they sought to give in evidence was improperly shut out. It became very material as a preliminary step towards offering evidence important as sustaining this view. And when the notice was shut out, the testimony in our hands was unavailing. But once in evidence, the continuous acts of the defendants followed, in the possession of the church, and the regular performance of all the functions of the "rector, church-wardens, and vestry," or, in other words, of the corporation of St. George's Church.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

This was an action of trespass for alleged injuries to the Parish Church of St. George's, in Carleton, and to a school-house in connection therewith, by taking out the windows and boarding up the windows and doors, thereby rendering the same unfit for occupation.

In addition to the general issue, the defendants gave several notices of defence, numbered respectively from one to five, in substance as follows:

1st. That the rector of St. George's Church, in the Parish of Carleton, died on the 8th December, 1866, and that since that time no person has been legally presented, instituted, appointed and inducted to be rector thereof, and that the benefice was at the time of committing the trespass vacant.

2nd. That any supposed presentation, etc., was not made according to law, or by any person having the right, etc.

3rd. That Cougle and Mayes, two of the defendants, now are, and were at the time, etc., the church-wardens of St. George's Church, and were in lawful possession, charge and control of the church, school-house and premises, and all the supposed trespasses, if any, were committed by them in the lawful, etc., discharge of their duties and rights as such church-wardens; that they made only such noise as they lawfully might, and shut up the church, if at all, for needed repairs and for other lawful causes.

4th. That the church and school-house at the time when, etc.,

were in lawful possession of Cougle and Mayes as such church-wardens, and that all the other defendants as their servants and at their command committed the several supposed trespasses, if any, as they lawfully might.

5th. That the said Cougle and Mayes and Peters, Noble, Coram, Littlehale, Leonard, Olive, Clarke, Neil and Dodge, were at, etc., the church-wardens and vestry of St. George's Church, and were in lawful possession, etc., of church, school-house and premises, and that all the trespasses, if any were commited, were lawful and proper acts, etc., done, etc., by them in the lawful, etc., discharge of their duties as such church-wardens and vestry; that they made only such noise as they lawfully might, and closed up the church and school-house, if at all, for the purpose of needed and necessary repairs, and for other lawful causes as they lawfully might; and did only such quiet and proper acts as they lawfully might for the purposes of making such repairs, etc., and for other lawful purposes, which are the supposed trespasses; and that all the other defendants as their servants and at their command, etc.

In the 1st, 2nd and 4th notices there is not anything alleged that has even the semblance of a legal answer to the action, and the statement which is put forward in 3rd and 5th as a justification, viz., that the church was closed for the purpose of repairs, is not only unsupported by the evidence but wholly disproved by the defendants themselves, for on the trial it was clearly admitted by the defendants who were examined, and from the whole evidence it was manifested beyond dispute that the allegation of repairs was a mere pretence, that the real object of the defendants in dismantling the church and closing it up was to prevent divine service being performed therein by the Rev. Wm. Walker, who claimed to be rector. This, we think, the defendants in this suit, as against the church corporation, have no right to do. Had defendants shewn that Mr. Walker was the legal rector, or that there was a rector, an important question might have arisen whether an action of trespass, such as this, should not have been brought in the rector's name. On this point we express no opinion, inasmuch as defendants have not raised the question, and it is one entirely inconsistent with their contention, viz., that Mr. Walker is not the legal rector, and that, in fact, the parish is without a rector, and which on the trial they so strenuously urged as a justification of their right to act as they did. All that we are called on to decide in this case is, that in the absence of proof of any rector, as against the church corporation, the plaintiffs in this suit, these defendants (even supposing they were members of the corporation) could not legally dismantle the church

by taking out the windows, or, by boarding it up, render it impossible to use the building as a place for holding public worship.

We are clearly of opinion that it is the duty of the church corporation who are the plaintiffs on the record in this suit, to preserve the church for the legitimate uses for which it was erected and consecrated, viz., for the performance of public worship therein by the duly appointed and legally inducted rector, and to enable the pew-holders and parishioners to attend divine service therein. To attempt to exclude either the one or the other, or to render the building unfit or impossible to be used as a church by pulling it to pieces or barricading access thereto, is as illegal as it is in our opinion indecent. To any person having the right to question the appointment of a rector the law affords a remedy and the Courts are open, but legal rights cannot in this or any other case be tried or settled by acts of desecration or violence. We are quite alive to the fact that this discussion leaves undetermined what we have gathered from the trial and argument is the real point in controversy, so far at any rate as the defendants are concerned, viz., the legality of the appointment of the rector. But in the way this case is presented to us that question does not properly arise, nor is there any evidence on either side to enable us to determine it were we disposed to do so. While we deplore the existence in this parish of a state of affairs so contrary to what is desirable for the well-being and peace of the church in the Parish of St. George, and the furthering of a true Christian spirit among its members, we equally regret that our suggestion thrown out with a view of enabling the parties to obtain a complete and final adjudication upon all the legal questions in dispute and so put an end to further litigation, should not have been acted on by the conflicting parties, viz., that a special case should be fully stated, under which all the legal questions in controversy could be fairly and squarely brought up and a final decision had, so that all persons interested might clearly understand their legal rights—whereby it was to be hoped harmony would in the end be restored; at least the scandal resting on the parish in its present divided state and barricaded church would not be so prominent to the public gaze. Our suggestion not having been acted on, we can only deal with the matter as it comes legitimately up before us, and for the reasons assigned we think the defendants have shewn no justification for their acts, and the church corporation are entitled to retain their verdict.

Rule discharged.

GANDY *v.* STAPLES, *et al.*

OCTOBER 30, 1869.

An unstamped cheque upon a party not being a chartered or licensed Banker, or Savings Bank, is void under Canadian Statute, 31 Vict., cap. 9. and cannot be received as evidence of payment.

This was an appeal from the St. John County Court. Assumpsit for goods sold and delivered, $95.38. Plea, the general issue with notice of set-off. The defence was that the defendants had given plaintiff a cheque for the amount, that they then had funds in the hands of the drawee, that it was not presented in due time, and no notice of dishonor given, and that the insolvency of the drawee and the closing of his place of business did not excuse the want of presentation or notice of dishonor. The cheque was as follows:—

ST. JOHN, N. B., Nov. 13th, 1868.

To the Cashier of SAMUEL J. SCOVIL,

Pay to Mr. William B. Gandy, or bearer, $95.38.

STAPLES, SPENCER & HAMPSON.

No stamp was affixed to this cheque, and the plaintiff's counsel, at the trial, objected to its being received in evidence, contending it was void in consequence of not being stamped under 31 Vict. cap. 7. The cheque was read, subject to the objection. There was no evidence to shew that S. J. Scovil was a chartered or licensed banker. The plaintiff testified that he received the cheque at nine o'clock of the evening of the day it was dated, which was on Friday; that Scovil stopped payment between half-past two and three, P. M. on Friday, his usual banking hours being 9 A. M. to 6 P. M, Scovil never resumed payment, and in consequence of the suspension the cheque was never presented and never paid. A verdict having been found for plaintiff, a new trial was moved for before the County Court Judge, on the grounds: 1. Defendants having funds in Scovil's hands and he having become insolvent after the drawing of the cheque, the cheque should have been presented some time on Saturday, or, in any case, before suit. 2. The presentation on Saturday should have been followed by notice of dishonor. 3. There being neither presentment nor notice, defendants are discharged. 4. Verdict against evidence. A new trial having been refused, the appeal was argued in Trinity Term last.

Travis for the appellants. There was neither presentment nor notice of dishonor here, and both were necessary, the only exception being in cases where there are no funds in the hands of the banker. Greenleaf Ev. 195 *a*. The cases all shew that insolvency does not excuse want of presentment. Esdale *v.* Sowerby, (11 East, 117). Where a cheque is given for a debt, and there is any laches in regard to the presentment of it, the original debt is discharged, a cheque being payment unless dishonored.

McLeod, contra, contended that as the cheque was not stamped, it was, under 31 Vict. cap. 9, a nullity, and the plaintiff was under no obligation to present it, the exceptions where a stamp is unnecessary being only in favor of chartered banks, licensed bankers, or savings banks.

Travis in reply. *Cur. adv. vult.*

RITCHIE, C. J., now delivered the judgment of the Court.

This was an appeal from the County Court of the City and County of St. John. The action was *assumpsit* for goods sold and delivered, the defence was that a cheque was given in payment, and that the drawer had funds in the hands of the drawee, and it was not presented in due time, and no notice of dishonor was given defendant, and that the insolvency or closing of drawee's place of business did not excuse want of presentation or notice.

The cheque was as follows:

ST. JOHN, N. B., November 13th, 1868.

To the Cashier of SAMUEL J. SCOVIL,

Pay to Mr. William B. Gandy, or bearer, $95.38.

STAPLES, SPENCER & HAMPSON.

This draft was not stamped, and, on the trial, plaintiff objected to its being received in evidence on that ground, and contended it was therefore null and void under the Canadian Act of 1867, cap. 9. This objection was overruled and the cheque read subject to the objection. No evidence was offered as to the banking character of the cashier of Samuel J. Scovil or of Samuel J. Scovil himself. The only reference to banking that we can discover in the evidence is the expressions banking house and banking hours, used by some of the witnesses when speaking of Scovil's place of business, and the hours during which he transacted business. A verdict was found for the plaintiff and a new trial moved for on the following grounds: 1. Defendants having funds in Scovil's hands, and he having become insolvent after the drawing of the cheque, the cheque should have been presented sometime on Saturday, the 14th November, or, in any case, before suit. 2. The presentation of the cheque on Saturday should have been followed by notice of dishonor to defendants, on Monday, 16th November. 3. There having been no presentment or notice of dishonor, defendant is discharged by plaintiff's laches. 4. Verdict against weight of evidence, no evidence to warrant verdict.

This application was refused, and we are now asked on behalf of defendants to reverse that decision, on the grounds urged in the Court below, but we do not think this application can prevail, because, without discussing the points raised, we think plaintiff has a

right to avail himself of his objection to the admission of the draft in evidence, and which he has urged before us, as we think the cheque, not having been stamped, should have been rejected by the Judge at the trial as invalid and of no effect, and being so void, plaintiff was clearly entitled to recover on the original consideration. By 31 Vict., cap 9. § 1. duties are imposed on promissory notes, drafts, and bills of exchange. Sect. 2 declares what shall be deemed instruments liable to duty, *inter alia*, "every bill, draft, order or instrument for the payment of any sum of money by a bill or promissory note, whether such payment be required to be made to the bearer, or to order." Sect. 3 declares the exceptions from duty, *inter alia*, any cheque upon any chartered bank, or licensed banker, or any savings bank, if the same shall be payable on demand. Sect. 4 declares that duties shall be paid by affixing adhesive stamps. Sect. 11 that instruments without stamps are invalid and of no effect in law or equity. To make this cheque valid without a stamp, it was indispensable that the party seeking to resist should bring it clearly within the exceptions of Sect. 3, and this defendants have failed to do, as we have nothing to shew us that the cashier of Samuel J. Scovil, on whom the same was drawn, or Samuel J. Scovil himself, was a chartered bank, or licensed banker, or a savings bank, within the meaning of that section, and so it became liable to the duty imposed by the first section, and comes expressly under Sect. 2, which declares what shall be deemed instruments liable to duty, and is, therefore, invalid and of no effect under Sect. 11.

Appeal dismissed with costs.

HAMILTON *v.* BRYSON.

OCTOBER 30, 1869.

Where a *fi. fa.* was delivered to the sheriff for the purpose of binding defendant's lands and not for the purpose of a sale, and the sheriff merely informed defendant that he had the execution and indorsed a levy upon it, and did no other act for more than five years, when he advertised the land for sale, the Court set the levy aside without costs.

A. G. Blair, in Easter Term last, made application on the part of the defendant and Isaac Allen Yerxa, mortgagee of the premises advertised for sale under the *fi. fa.* issued in this cause, to set aside the levy and all subsequent proceedings upon the grounds:

1st. Execution not placed in plaintiff's lands to be executed, it being delivered with instructions to hold it to bind defendant's lands. 2nd. No proper levy upon the real estate. 3rd. If the levy was

legally made it was not proceeded with to advertisement and sale within proper time, and was vacated by plaintiff's directions to proceed no further, the debt being settled.

4th. That this was a fraud upon defendant and upon Yerxa, the mortgagee; failing these points to set aside execution and levy and order satisfaction to be entered on the roll, or to reduce amount for which the levy was to hold good. It appeared by affidavits that defendant gave plaintiff a bond and warrant of attorney, dated 28th November, 1862, as a security for advances then to be made by plaintiff to defendant, upon which judgment was entered up 29th November, 1862, and a *fi. fa.* execution issued, delivered to J. S. White, sheriff of Sunbury, on the 2nd January, 1863, indorsed £3,005 11s. at the delivery of execution. The plaintiff was instructed to hold it to bind defendant's lands, and he made his levy by an indorsement upon the execution. No further steps were taken by the sheriff, under the execution, until December 28th, 1868, when he advertised the property for sale by direction of plaintiff's executors. On the 11th December, 1865, the plaintiff died, but, prior to his death, he several times told the plaintiff that he wanted nothing further done with the execution, as the debt had been settled. In November, 1867, Yerxa, after examining the records and finding no memorial recorded, and receiving a statement of facts from sheriff, loaned $300 upon the property and took a mortgage therefor. It also appeared that plaintiff rendered defendant an account in July, 1865, in which the costs of the judgment were charged, which account was settled, and defendant stated that the plaintiff rendered the account as final, and forgave him any indebtedness prior thereto.

A rule *nisi* having been granted,

F. E. Barker shewed cause in Trinity Term. As to the first point, that the execution was placed in the sheriff's hands not to be executed, but to be held there; that is a question which I submit Bryson cannot now raise. He shews himself that the *fi. fa.* was intended to bind the lands, which clearly proves that it was to be executed, for otherwise, it would not bind them. Then I presume they were bound to sell, and if Bryson could not raise this question, Yerxa cannot do it. As to the second point, that no proper levy was made, and that the personal estate should have been exhausted before the real estate. I admit that he must exhaust the personal estate first, but that would not be a ground for setting aside the execution. [RITCHIE, C. J.: Would it not be a ground for setting aside the levy?] It was clear the levy was made in 1864, and if he wished to set it aside he should have applied long before, so that the sheriff might have had an opportunity of levying on the personal estate. Where there is an

irregularity, the party should apply promptly. As to the third point, that if the levy was good, it ceased to be so by reason of the delay, there is, I submit, nothing in that; the statute places no limit. As to the last point, that this was a fraud upon defendant and Yerxa. These executors, when they found that a levy had been made, and the claim was out-standing and unpaid, could not do otherwise than proceed. If the alleged agreement amounted to anything, it was merely that he would do a certain thing at Bryson's request, and Bryson never made the request.

Blair, in support of the application. 1st. Upon the first point, the execution only binds lands when delivered to the sheriff to be executed. 1 Rev. Stat., cap. 113, sec. 4. Instructions to the sheriff to hold execution to bind lands are not instructions to execute. Plaintiff's intention clearly was that it should operate as a lien, and that it could not do. The meaning of the words "*to be executed*" are plain. "A *fi. fa.* is not executed when a levy is made; it is only executed by sale by sheriff." See Sed. 184, sec. 92, Kel. 105. Plaintiff's instructions were that a sale should not be made; therefore the *fi. fa.* was not delivered to be executed. If the plaintiff's instructions not to execute at the delivery of execution are not plain, his acquiescence in the delay until his death, and frequent conversations with the sheriff, remove all doubt. An execution properly delivered ceases to bind lands when plaintiff changes his mind and instructs the sheriff not to execute; it is tantamount to withdrawal, 1 Arch. Pr. 544, and cannot be revived. After it has become returnable, it is not considered to be in the sheriff's hands. Here this mortgage was taken after the writ had been lying about five years in the sheriff's hands unexecuted, and no directions to advertise and sell were given until a year afterwards. See Johnson *v.* Crocker, (4 Allen 100). Yerxa here, as mortgagee, is in the position of a purchaser for a valuable consideration, and if defendant cannot avail himself of the defect Yerxa can. 1 Ar. Pr. 379, cites 1 Saund. 219 fol., 2 Vent. 218.

Upon the second point, no proper levy upon real estate. The sheriff made no levy in this case. It is not sufficient to make a memorandum upon the writ. Going upon the land and taking a memorandum, and giving notice to defendant, when practicable, are perhaps uecessary, but not sufficient, as intimated in Doe *d.* Hazen *v.* Hazen, (3 Allen, 97 and 93). Advertisement of sale is the essential requirement. If neither the actual seizure, notice to defendant, nor advertisement, are necessary to make a levy, how is it made? If either are necessary then no levy has been made in this case.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

We are not satisfied by the affidavits in this case that the defendant has shewn any ground for entering satisfaction on the judgment in this case; but, considering the peculiar circumstances under which the execution was placed in the hands of the sheriff, namely, to bind the defendant's land, and not for the purpose of sale; and also considering that the sheriff only informed the defendant that he had the execution, and did not advertise the land till more than five years after the execution was placed in his hands, we think such a levy, (if it can be called a levy) ought not to be allowed to stand. The levy under the execution will, therefore, be set aside without costs.

McKENZIE, CURATOR OF THE WESTMORLAND BANK, & SEAMAN *et al.*

OCTOBER, 30, 1869.

A Judge's order settling the list of contributories, under the Winding-up Act, is only *prima facie* evidence of liability, and the defendant may give evidence at the trial to shew that he is not a stockholder.

This was an action to recover an assesement on certain bank stock made under 27 Vict., cap. 44, for payment of the debts of the said bank, it having suspended payment. The defendants were declared against as holders of ten shares of the capital stock of the said bank, and that they became liable to pay the plaintiff, as curator, $500, being fifty per cent. of their shares of the capital stock of the said bank. At the trial before WELDON, J., at the last Westmorland Circuit, the only evidence of the defendants being stockholders was the order of the Judge settling the list of contributories. The defence was, and evidence was offered to prove, that the defendants were not stockholders, and that the order for winding up was obtained by fraud. This evidence was rejected and a verdict was found for plaintiff.

I. Allen Jack, in Hilary Term, obtained a rule *nisi* for a new trial on the ground *inter alia* of improper rejection of evidence.

A. L. Palmer, Q. C., shewed cause in Easter Term. I contend that the Judge having decided who were stockholders, his decision cannot be disproved until the judgment is set aside, for it is *res adjudicata*. The same point was decided in Regina *v.* Sparrow (*ante* 115). The doctrine there applies to this case. The Winding-up Act gives the Judge power to adjudicate in this way, the object of the law being to provide a speedy remedy

I. Allen Jack, contra. Regina *v.* Sparrow is entirely against the position taken by Mr. Palmer. Philipson *v.* The Earl of Egrement (6 Q. B. 595) is an entirely analogous case to this. It cannot be contended that a preliminary proceeding such as the settling of the list of contributories is *res adjudicata.* At most it was only *prima facie* evidence of the defendants being liable as stockholders, and we should have been allowed to prove that we were not stockholders, and therefore not liable.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

The main defence was that the defendants were not stockholders and so not liable for the call for which this action was brought, the only evidence in this case of the defendants being stockholders was the order of the Judge settling the list of contributories in which the defendants were set down as stockholders, and therefore liable as such to contribute. Defendants offered evidence to disprove the allegation of their being stockholders, and to shew fraud in obtaining the Judge's order, in which they were declared stockholders. The utmost effect that the Judge's order, in our opinion, could have would be to shew defendants *prima facie* liable, and though they might have applied to the Judge to amend or rescind his order, we think it was open to them in the trial in this Court to shew in fact that they were not stockholders, and we can see no reason why they should not be allowed to shew that the order by which it is attempted to fix them *prima facie* as such was obtained by fraud and so void.

Rule absolute for new trial.

MAHONEY *et al v.* THE PROVINCIAL INSURANCE COMPANY.

OCTOBER 30, 1869.

Plaintiffs applied to defendants on Nov. 12th to insure their vessel on a time policy for six months, beginning on the 9th Sept. previous, the day on which she left Swansea for St. Thomas, where she was then over-due. In the written application in reply to the question "where bound," the plaintiff's reply was "a port in the West Indies." The news of a hurricane having occurred at St. Thomas had been published in the newspapers that morning and was known to plaintiffs but not to defendants. Held, In an action to recover for a total loss that the destination of the vessel and the fact of their being a hurricane at her port of destination should have been communicated to defendants, and this not having been done the plaintiffs were nonsuited.

This was an action to recover for a total loss on the brigantine *R. Scoles*, on a policy issued by defendants, dated 12th November,

1867. At the trial before WELDON, J., at the King's Circuit, a nonsuit was moved for by defendants counsel on the grounds: 1. That the actual loss ought to have been known and could have been known to the owners at the time insurance was effected, and should have been communicated to the underwriters, and this not having been done the policy was void. 2. Even if this was not the case the fact of there having been a hurricane at St. Thomas, whither the vessel was bound, ought and could have been known to the owners, and should have been communicated. 3. The fact of there being a hurricane there was known to some of the plaintiffs on the morning of the 12th November, which was a material fact which should have been communicated to the underwriters, and that not being done the policy was void. 4. The owners, on applying for insurance, concealed the fact of the vessel being bound for St. Thomas when she sailed on the 9th September. An ordinary voyage was proved to be from twenty to thirty days; at last advices she was overdue, which fact was concealed, and when asked by the insurers where she was bound the answer in the application was a port in the West Indies. The learned Judge refused a nonsuit, and a verdict for plaintiff was taken by consent with leave to move for a nonsuit before the Court in June. The facts of the case are fully and carefully set out in the judgment of the Court.

A. L. Palmer, Q. C., obtained a rule *nisi* for a nonsuit in Michaelmas Term last, pursuant to leave reserved.

Wetmore, Attorney General, and *C. W. Weldon*, shewed cause in Hilary Term. We contend that the insurance was fully effected on the 11th by parol. It is not necessary for a policy of insurance to be in writing; a verbal agreement is sufficient. 2. Par. Mar, Law 19. When the proposal for insurance was made by McLaughlin to defendants and agreed to by them, the insurance was effected and a bill in equity would then lie to compel defendants to give the policy. On the 10th no intimation of the hurricane had reached St. John; the application was filled in, except the date of the vessel leaving Swansea, which was the time at which the policy was to begin, and the defendants had accepted the risk and nothing remained but to fill in the date and issue the policy. Under these circumstances a Court of Equity would compel a specific performance, 1 Arnold Mar. In. 254). This was expressed by Lord Denman in Mead v. Davidson, (3 A. & E. 303), Burgess v. Wickham, (3 B. & S. 669). Great stress was laid on the fact of the plaintiff stating on the 12th that the vessel was bound for some port in the West Indies, when he knew she was going to St. Thomas, but it is not necessary in a time policy to state where the vessel is bound unless it was a pro-

hibited port and the contract of insurance was complete on the 11th. If it was not binding on the 11th it was not binding on the 12th, and as on the 15th, when the facts were notorious, the defendants issued the policy they must abide by it. As to whether the plaintiffs knew of the hurricane, the mere fact of there being a rumor of a hurricane at St. Thomas would not vitiate the policy. After the news of the hurricane had become quite public, on the 15th, the defendants issued the policy to plaintiff and took the premium note. Besides, the news of there being a hurricane there was equally available to defendants as to the plaintiffs, and equally within their means of knowledge, therefore the plaintiffs were not bound to communicate it to them. It has been contended that the captain was bound to send word by his wife, and that he should have instructed her to telegraph to the owners from New York, or sent instructions to telegraph from Cuba. The *Marmion*, in which she left St. Thomas, was only a casual steamer, not a regular or mail packet. There was no telegraph line from St. Thomas. The mail steamer did not leave St. Thomas until the 18th November, therefore the captain did more than he was bound to do in sending word by the *Marmion*. His sending by a casual vessel would not have excused him from sending word by the regular means of conveyance, and therefore it cannot be contended that the captain was required to cause his wife to telegraph from New York. She arrived at St. John on the 15th, and immediately communicated the loss to the owners.

A. L. Palmer, Q. C., contra. The insurance was not complete on the 11th, for Mr. McLaughlin did not then know the date of the vessel leaving Swansea, from which the policy was to run. The application was signed by the three plaintiffs on the morning of the 12th. McLaughlin admits that when he heard of the hurricane he became anxious about his insurance, and Mahoney said to him he hardly thought the insurance could be effected. There was no contract on the 11th, and on the 12th, the fact of there being a hurricane, which was known to McLaughlin, should have been communicated by him to the defendants. Plaintiffs knew when the insurance was effected that the vessel was overdue at St. Thomas and that there had been a hurricane there. Plaintiffs in their application stated that the vessel was bound for a port in the West Indies. That was not a fair answer, for the plaintiffs knew she was bound to St. Thomas. Kirby *v.* Smith, (1 B. & Al. 672), shews that a concealment relative to the sailing of a vessel is a material concealment fatal to the policy. Where plaintiff concealed the fact of his having received letters stating that there were privateers in these seas he

was nonsuited on the ground of concealment. The assured is bound to communicate all the information he has received, though he does not know it to be true. Lynch *v.* Hamilton, (3 Taunt. 37). Here the application for insurance is a misrepresentation in every respect, and the policy is therefore void. I contend, also, that the plaintiffs were bound to know of the actual loss of the vessel before the insurance was effected. She was lost on the 29th October. On the 1st November the *Marmion* arrived and left next day for New York *via* Cuba. The captain should have written to Cuba to the telegraph office there and so communicated with St. John; or at all events his wife, who arrived at New York in the *Marmion* on the 10th November, should have been instructed to telegraph the loss to St. John.

Cur. adv. vult.

RITCHIE, C. J., now delivered the judgment of the Court.

This was an action to recover for a total loss on the brigantine "R. Scoles," under a policy issued by the defendants, dated at St. John, N. B., the 12th November, 1867, whereby defendants insured $2,000 on the body of the said brigantine, "for the period of six months, from the 9th September, 1867, at noon, to the 9th day of March, 1868, at noon. This insurance to be confined to voyages along the east coast of America, West Indies, British America, Nova Scotia and New Brunswick, and to and from Europe, but not to ports on the Mediterranean, one per cent. additional to be charged for each passage between ports in the United Kingdom or continent of Europe and ports in North America, or *vice versa*, during the months of November, December, January and February, included in the term of this insurance," at the rate of 7 per cent. There was a written application for the insurance, signed by plaintiffs, dated 11th November, 1867, subsequently altered to 12th November, in which the time to be insured was six months from 9th (October *struck through*) September, 1867. McLaughlin says he wished the policy to commence from the time the vessel sailed, which, he says, he first thought was the 4th October. After seeing one of the other owners, he found she had sailed on the 9th September, and altered it in the application to that date, and he took the application away to get the correct date of her sailing, and under printed head in such application, where vessel is at present, the reply is "Swansea, when last heard from;" under head when to sail, "On September 9th, to a port in the West Indies;" under head description of cargo, "coals." A verbal application for insurance was made on the 11th, but the written application was taken away by plaintiff, McLauchlin, on

that day, to get the correct date of her sailing. The application, he says, was signed on the morning of the 12th, on which morning the date of sailing was inserted, and the time from which the policy was to continue must have been then altered from October to September. In addition to the representation in the written application, Walker, defendant's clerk, says he asked, as he invariably did, where the vessel was bound to, and McLaughlin said "a port in the West Indies." The plaintiff had information from the papers, before effecting the insurance, that the vessel was to sail from Swansea, for St. Thomas, with coals. Sailing from Swansea on the 9th September for St. Thomas, the vessel would be overdue on the 12th November. A report of a violent hurricane at St. Thomas appeared in the morning papers published in St. John on the 12th, as follows:—

Last Night's Despatch.

NEW YORK, Nov. 11.

By the arrival of the steamer "Marmion" from St. Thomas, 1st inst., we have additional particulars of the great hurricane there. The surgeon of the steamer reports: "We arrived at St. Thomas on the morning of the 30th, and found that the island had been visited the day previous by the most terrific hurricane ever known there, the town being partially destroyed and the loss of life very great. The amount of property destroyed at present it is impossible to estimate. The scene of destruction and devastation it is impossible to describe. The wind commenced blowing a pretty stiff breeze about 8 o'clock from the north-west, and about 11 o'clock it changed round to the east and blew a perfect hurricane, carrying everything before it. It lasted about four hours, but during that time raged with such violence that trees were torn up, houses lifted from their foundations and dashed to pieces. Ships and steamers of the largest class, as well as smaller vessels, were hurled together and either dashed to pieces or sunk, some fifty or sixty vessels are ashore dismasted or sunk and part of their crews lost. Thousands are rendered homeless, and the amount of suffering, confusion and excitement it is impossible to describe. There is nothing doing; everything seems paralyzed.

Mahoney, one of the plaintiffs, says he heard of the hurricane by the papers of Tuesday morning, and at Mahoney's store, when McLaughlin was getting the date put in the application, the hurricane was spoken of, and McLaughlin says, "my impression is, the subject of the hurricane was discussed in Mahoney's store; Thompson was there; I observed I had made the application." He says Mahoney said he hardly thought I could get the insurance done, to which he, McLaughlin, replied that he thought it was done. Thompson says, in Mahoney's store, McLaughlin came in, talked about putting $2,000. Mahoney said it would be a good thing to get it, but after news of the hurricane, did not believe it could be done. McLaughlin said: "I got it done last evening," which was clearly not the case. Walker says he gave him a blank application, and told him the usual rates, and agreed to take it if all was satisfactory, but until the application was completed and handed in and the policy issued, on the 12th inst., it is abundantly manifest no in-

surance was affected. On the 11th, in fact, not only was no policy then issued—none could be—but the application was wholly incomplete, not only with respect to the information required by the office, but with respect to the time which the policy was to cover.

A note was given for the premium, and Walker handed Wilson the policy, but the exact time when does not appear. On the 15th, after the policy had been delivered, news arrived of the loss of the "R. Scoles" at St. Thomas, in the hurricane. The "R. Scoles" arrived at St. Thomas on the 22nd October; on the 29th the gale commenced. After the gale, Wyman, the captain, says she was the only vessel not driven ashore; the gale then commenced afresh and drove the "R. Scoles" ashore. The hurricane was most violent, lasting three hours. No vessels at St. Thomas escaped, and the "R. Scoles" became a total wreck, and was sold for $215. The "Marmion," a casual steamer, not a regular trader or mail steamer at St. Thomas, called there on the 31st October, bound for St. Jago de Cuba and New York, and sailed two days after the hurricane. In this vessel the captain's wife left; the captain did not write by her. He commenced writing, but was flustered and anxious to get his wife on board, tore up the unfinished letters and told her to inform the owners of the loss, but gave no direction for her to write or telegraph from New York. The "Marmion" arrived at New York on Sunday, 10th November. Mrs. Wyman left next day and arrived at St. John on Friday following, and on Saturday communicated the loss to the owners. The loss of the "R. Scoles" was first heard of by the owners on the 15th. There are no facts in this case in dispute, no question of fact which either party desired to have put to the jury, the Judge having offered to submit to the jury any question of fact either party might desire to have left to them. The plaintiffs simply claimed that the policy having been entered into, and loss shewn, they were entitled to recover, and the defendants contended that as the fact or rumor of the hurricane at St. Thomas was known to plaintiff on the morning of the 12th November, before the written application was completed and handed in, and therefore before the insurance was or could have been effected, it should have been, but was not, communicated to the underwriter, and so the policy was void. That there was a concealment of the fact that the vessel was bound for St. Thomas, and that this fact was material and should have been communicated. That the actual loss ought to have been made known to the owners at the time the insurance was effected; that the captain might and should have written to New York by the steamer, and directed the fact to be telegraphed, or should have instructed his wife to telegraph in New York, in either of which cases the news in due course would have reached them before the insurance

was effected. With respect to the duty of a party applying for insurance in view of the perfect good faith which is the very essence of this contract, it is clear that if a party having given instructions for effecting a policy, receive intelligence material to the risk he must forthwith, or with due and reasonable diligence, communicate it or countermand his instructions. Many things may or may not be material, according as the circumstances of the case make them the one or the other, and then these same circumstances determine whether they must be disclosed. All facts material to the risk, known to the one party and not to the other, must be fully and fairly declared, for, as said by Cockburn, C. J., in Bates v. Hamilton (L. R. 2, Q. B. 604), "no proposition of insurance law can be better established than this, viz: that the party proposing the insurance is bound to communicate to the insurer all matters which will enable him to determine the extent of the risk against which he undertakes to guarantee the assured." As a general proposition it may be true that in effecting a time policy such as this, it is not necessary to state the time of sailing on, or terminus of the particular voyage the vessel was pursuing at the time of effecting the policy, but these facts may become material, as in this case, where the policy was to have a retrospective operation, any circumstances connected with the probable whereabouts of the vessel may be important, as if the time of sailing be such as to make the ship a missing ship, or as if the information or report of a hurricane having occurred at the place, in which, having reference to her time of sailing and port of destination, she might reasonably be supposed, in the ordinary course of her voyage, to have then been. In such a case her probable position or the facts within the knowledge of the assured, by which he was enabled to judge of her probable position, together with such information or report enabling him to form an estimate of her probable safety or danger, should have been communicated to place both parties on a fair and equal footing, the principle being, that in determining whether any fact, actual or rumored, is material, we must ascertain whether the fact would naturally and reasonably enter into the estimate of the risk or the reasons for or against entering into the contract of insurance. So, also, the assured must make true answers to all questions which the insurer may put to him. Thus, in this case, when asked the destination of the vessel, the answer is a port in the West Indies. Must it not be presumed that he did not know the particular port, and that he was giving the most accurate and best information he had? If he had better information and did in fact know the exact port to which she was destined, and if to reach that port the vessel would be overdue, and therefore the reasonable calculation would be that she was or ought to be at that port, and if with

knowledge that a hurricane had visited the place after she would have arrived, and while she would in due course be there, under such circumstances withholding the particular information and giving instead such a general answer, would, in our opinion, be equivalent to a false representation or concealment, because the circumstances in such a case would make a statement of the particular port material, and the general answer be calculated to mislead or at any rate to disarm suspicion or lull inquiry. The object of the rules as to representation, misrepresentation, and concealment, being to enable the insurers to judge with accuracy of the risk they underdtake. If the insurer has the same information as the assured then there is clearly no need of it being communicated. In this case the language of one of the plaintiff's clearly shews that he knew the information of the hurricane was material and calculated to operate on the mind of the underwriter, else why the expression of his fears that the risk would not be taken? In the language of Mansfield, C. J., in the case of Lynch v. Hamilton (3 Taunt. 44), where the rumor was groundless, while here it was strictly accurate, he says, as we now do, "we decide on the ground of the adjudged cases applied to the circumstance of the present action, namely, that the plaintiff did not communicate the rumor so prejudicial to the safety of the vessel, when he himself knew it."

We feel it unnecessary to say anything on the other point which did not strike any of us in the argument very forcibly, but which we have not considered as the point now determined by us must dispose of the case. We do not think there is anything prejudicial to defendants in their position, with reference to the underwriters attempting to claim the premium note, because whether plaintiffs would be entitled to a return of the premium or not, would depend on whether there was fraud in the representation or concealment. See Anderson v. Thornton, (20 L. & E. 341).

Rule absolute for nonsuit.

INDEX.

A.

ABSCONDING DEBTOR.

1. Where a debtor was a resident of the State of Maine, but did business in this Province, and went away for the purpose of defrauding his creditors, held that he might be proceeded against under the Absconding Debtor's Act. *Regina* v. *Steadman*. 368

ACCOUNT.

See TENANT IN COMMON. EVIDENCE, 12.

ACCOUNT STATED.

An account containing debits and credits was presented by the plaintiff to the defendant who admitted it to be correct, but refused to sign it, alleging that there might be other credits to which he was entitled, and for which he required time to consider; Held, That this did not prove an account stated. *Harley* v. *Goodfellow*. 335

ADMINISTRATION.

See INJUNCTION 1. PROMISSORY NOTE 1.

1. The executors of a deceased administrator have no right to file an account of his administration in the Probate Court; nor has the Judge of Probates any authority to pass such an account if filed. *In re Isaac C. Frost*. 127

2. If an administrator dies without having filed an inventory or account, and his executors have assets in their hands, belonging to the original estate, a Court of Equity will compel them to account. *Ibid.*

3. In an application to put an administration bond in suit, the Court will not determine whether there has been a breach of the bond. If the applicant make out a *prima facie* case of breach, and that he is a proper person to sue for it, he is entitled to an assignment. *In re Hunter*. 233

4. An assignment will not be refused though there is a variance between the bond and the form given by the Act. *Ibid.*

. The counsel moving for the assignment is not bound to show that he is authorized to make the application. *Ibid.*

6. It is sufficient to show the substance of the proceedings against the administrator in the Probate Court without producing a copy of them. *Ibid.*

AFFIDAVIT.

See PRACTICE, 5. PERJURY, 1.

AGENT.

See INSURANCE BROKER, 1.

1. Defendant being about to leave the Province, gave a Power of Attorney to an agent, authorizing him to appear to and defend any action that might be brought against the defendant during his absence. A suit was commenced, and a copy of the writ sent to the agent, who declined to appear. Held that the agent was not bound to appear, and that interlocutory judgment signed for want of appearance, was irregular. *Harris* v. *Mitchell*. 2

2. D., a plumber, working on defendant's house, addressed to him a memorandum stating that he would require to send to plaintiffs, in Boston, for certain articles specified, which defendant gave to T.. an expressman, who handed it to plaintiffs. Plaintiffs treated it as an order from D., with whom they had dealings, and sent the goods and invoice to him by T., and D. refused to receive them. T. then delivered them to defendant who paid T. for them and took his receipt. Plaintiffs remaining ignorant of this transaction demanded payment of D., which he refused.

Held, 1.—That by bringing *assumpsit* for goods sold and delivered against defendant, they waived the tort, ratified the sale by T., and treated him as their agent, and payment to him discharged defendant.

2.—That the plaintiff might have maintained trover against defendant for a wrongful conversion. *Dalton et al.* v. *Hamilton*. 422

AGREEMENT.

See CONTRACT. SUBSTITUTED AGREEMENT.

AMENDMENT.

See MALICIOUS PROSECUTION, 2.

1. Where one of the persons named as defendants in a suit had died before the summons issued, the pleadings were amended by striking out his name, and the answer was re-sworn. *Byers* v. *Harrigan*. 230

2. Where an amendment was made in a foreclosure suit, by adding plaintiffs after the filing of the bill, the defendant was allowed a month to answer after service of the order to amend, and of a copy of the amended bill. *Wright* v. *Evanson*. 232

ANSWER (IN EQUITY).

1. An objection that a suit is defective for want of parties, cannot be taken on the argument of exceptions to the defendant's answer. *Hendricks* v. *Hallet*. 185

2. In answering interrogatories, the defendant must confess, or traverse the substance of each charge in the bill. Particular charges must be answered particularly and precisely, and not in a general manner. *Ibid.*

3. Where defendant is interrogated as to the receipt of particular sums of money, it is not sufficient to refer to an account annexed to his

answer, as shewing what he had received, unless he states that it is the best account he can give. *Ibid.*

4. If he states that an account annexed to his answer, contains all the information he is able to give on a particular question, it is sufficient; though it was his duty to have kept a more particular account. *Ibid.*

5. Defendant is bound to answer an interrogatory if it is pertinent to the case made by the bill, though it is not founded on any specific charge in the bill: and *semble*, that he should answer an interrogatory whether it is material or not. *Ibid.*

6. Defendant, filling the offices of trustee and executor, is bound to answer an interrogatory, whether his accounts distinguish the receipts and charges as trustee, from those as executor. It is not sufficient to refer the plaintiff to the accounts. *Ibid.*

7. Defendant is bound to answer as to his own transactions, and, if necessary, to obtain information to enable him to do so; but he is not bound to seek information as to transactions not his own, and of matters equally accessible to the plaintiff. *Ibid.*

8. As a general rule, if defendant professes to answer, he must do so fully; and he cannot protect himself from the consequences of an insufficient answer, by objecting that the interrogatory is not warranted by the bill, or that the plaintiff has no equity. *Ibid.*

9. An answer which states a conclusion of law is insufficient. *Ibid.*

10. When an answer denies or ignores a matter inquired after, it must be as to the defendant's knowledge, information or belief. *Ibid.*

11. Defendant may be interrogated as to the contents of writings, decrees, &c. *Ibid.*

12. Where the discovery would be material to the case made and the relief prayed by the bill, a defendant may be interrogated as to the amount of his property, and his ability to pay; but he is not bound to answer a mere hypothetical interrogatory. *Ibid.*

ASSAULT.

1. On an indictment for murder, the jury found the prisoner guilty of an assault only, and that such assault did not conduce to the death of the deceased. Held, That the prisoner, under such finding, could not be convicted of the assault under the 1 Rev. Stat., c. 149, § 20. *The Queen* v. *Cregan.* 36.

ASSESSMENT.

See School Assessment.

1. An assessment made by commissioners of sewers, under 22 Vict., cap. 53, § 10, must be upon the owner of the land by name, and not upon the land itself. *The Queen* v. *The Commissioners, &c., Germantown Lake.* 341

2. K, a commissioner of sewers for the Germantown Lake District, became contractor for the execution of certain work executed under their direction, and afterwards sat and voted with the other commissioners, when they decided that the work had been satisfactorily performed, and ordered an assessment on the land owners to pay for it. Held, That the assessment was bad. *Ibid.*

3. The General Sessions has no power to order an assessment as for County contingencies, to meet the costs incurred by a party in making, and by the assessors in resisting, an application to quash an assessment under the Parish School Act. *Regina* v. *Assessors of King's.* 528

ATTACHMENT.

1. Where a party is served with a subpœna to attend as a witness and accepts a sum of money which is tendered to him for his expenses, without objecting to the amount, but refuses to attend on account of his own business, he is liable to an attachment for non-attendance, even though the sum tendered be less than he is entitled to receive under the ordinance of fees. *Gilbert* v. *Campbell.* 258

ATTORNEY.

See Costs.

A writ issued by an uncertificated attorney, and all proceedings taken thereunder, will be set aside. *DesBrisay* v. *Mackey.* 138

B

BARON & FEME.

See Separate Property, 1, 2. Declaration, 2. Execution, 3. Contract, 10.

BASTARDY.

1. An order of affiliation may be quashed in part and confirmed as to the rest, if the defective part can be separated from the other. *The Queen* v. *Simpson.* 32

2. Where in a bastardy case by consent of counsel a single Justice tried the matter alone and afterwards made an order of affiliation, the Court held that a Court could not be constituted by consent, and ordered the proceedings to be quashed. *The Queen* v. *The Justices of Westmorland.* 472

3. Held, also, that the Court not being properly constituted there was no trial at all, and the party was required to enter into recognizances to answer the charge before sessions. *Ibid.*

BEQUEST.

See Debt 1. Will 1.

BILL IN EQUITY.

1. An allegation in the bill, that the plaintiff had purchased the rights of two of the heirs, and obtained conveyance thereof, shews a sufficient interest in the subject matter of the suit. *Coy* v. *Coy.* 177

2. In a suit for foreclosure of a mortgage in fee, after the death of the mortgagee, the bill must shew in whom the legal estate is vested. Alleging that the plaintiff is executor and trustee of the mortgagee is not sufficient. *Wiggins and others* v. *Floyd.* 229

3. In a suit to obtain payment of a legacy; *quære*, whether, if the bill shows the personal estate insufficient for payment of the debts, it must not

also show that the legacy was charged on the land, if the plaintiff seeks payment therefrom. *Wallace and Wife* v. *Woods.* 230

BOND.

See ADMINISTRATION.

1. One of the conditions of a bond given to the Crown by a Deputy Postmaster, required him to give three months notice to the Postmaster General of his intention to resign his office, and to pay all sums of money chargeable against him as Postmaster. At the time of his resignation, a Postmaster was a defaulter, and died insolvent, about twenty-one months after. No proceedings were taken against him to enforce payment, though he was applied to several times, and promised payment, and no notice of his indebtedness was given to his sureties till after his death. Held, That his sureties were not entitled to be relieved from the bond under the 33 Hen. 8, c. 39, § 79. *The Queen* v. *Hammond and another.* 33

C

CERTIFICATE.

See ATTORNEY, 1.

CERTIORARI.

1. Where an assessment was ordered on the 20th October, and a rule *nisi* for a *certiorari* obtained at Chambers on 27th February, returnable in Easter, the Court held the application to be in time. *Regina* v. *The Assessors of Rates, Kings.* 528

2. The provisions of 1 Rev. Stat., cap. 53, § 6, requiring security for costs before granting a *certiorari* to remove a rate, is not incorporated in the Parish School Act. *Ibid.*

CHALLENGE.

1. It is not a ground of challenge to the array, that some of the jurors named in the sheriff's pane, are not on the list of persons qualified to serve as jurors, filed under the Act 18, Vict., c. 24. *Dow and Wife* v. *Dibblee.* 55

2. It is no objection to the sheriff summoning or the jury serving that the sheriff and jury were corporators of the city of St. John, and that the action was based and the land in dispute was, upon a lease made by the mayor, aldermen, and commonalty of the city of St. John, in which they had a reversionary interest, it not appearing that they had any interest in the suit. *Doe dem. Grant* v. *Boyne.* 342

CHATTEL.

See TRESPASS, 2.

Manure lying in heaps in the barn-yard is a chattel, which may be taken away by the out-going tenant, even after his tenancy has expired, and trover will lie for it if held or taken away by the landlord. *Foshay* v. *Barnes.* 452

CHURCH CORPORATION.

1. An action for damage done to the church property, in the absence of proof of their being any legally inducted rector, may be brought in the name of the church corporation. *Rector, etc., St. George's Church* v. *Cougle et al.* 620

2. In an action against defendants in the name of the church corporation, for boarding up the church windows and doors, the defendants gave as notices of justification that they were churchwardens, and closed the church for repairs. On the trial, one of the defendants admitted that they had closed the church to prevent a clergyman who claimed to be rector from officiating there.

Held, That in the absence of proof of there being any rector, the defe dants, as against the church corporation, had no right to dismantle the church even though they were them elves members of the corporation. *Ibid.*

CITY COUNCILLOR.

A contractor with the commissioners of the Alms House for the County of York, is disqualified from being elected a city councillor in Fredericton, under the Act 22, Vict., c. 8. *Ex parte Cameron.* 306

COMMISSIONER.

See ASSESSMENT, 1, 2.

1. An owner of land in the Germantown Lake District is disqualified from acting as a commissioner of sewers for that district, the duties of such commissioners under 22 Vict., cap. 53, being of a judicial character. *The Queen* v. *Commissioners of Sewers Germantown Lake.* 341

2. A commissioner appointed to examine confined debtors was held disqualified from holding an examination in a case in which the plaintiff was a first cousin to his wife. *Peck* v. *Barbarie.* 523

The Act 2, Wm. 4, c. 26, incorporating the St. John Water Company, authorized them to draw water from, erect reservoirs on, and carry pipes through private property, provided that no such water should be drawn, &c., without compensation being paid for the use of the same, and for any damage sustained by the operations of the company, and in case of disagreement between the company and the owners of the land, the compensation to be determined by arbitration; and if the owner of the property should decline to appoint an arbitrator, the Supreme Court, on application of the company, should issue a warrant to the sheriff to summon a jury to assess the amount to be paid.

By Act 12, Vict., c. 51, further powers were given to the company to enter on private property, erect dams, and draw water from any stream, on paying compensation to the owners—the amount to be determined as by the Act 2, Wm. 4, c. 26. After the passing of this Act, the Water Company erected a dam upon a stream flowing through private property, laid down pipes and diverted the water from its natural channel, without the consent of the owners.

By Act 18, Vict., c. 38, all the property, rights, powers and privileges of the Water Company were vested in commissioners appointed under this Act, saving to all parties all rights, remedies and actions, for any act done, or for any contract theretofore made, and giving the commissioners power to lay down pipes, &c., for extending a supply of water; and providing that in case of damage done in the execution of the works, the commissioners should pay the party sustaining the same, such compensation as should be agreed upon, and in case they could not agree, the commissioners should, on request of such party, ap-

ply to a Justice of the Peace for a warrant to the sheriff to summon a jury to assess the damages. The commissioners continued the obstruction placed on the stream by the Water Company, and laid down additional pipes, drawing off a much larger quantity of water.

A, claiming as one of the heirs of the former owner, then gave notice to the commissioners that he claimed damages under the Act 2, Wm. 4, c. 26, and the several Acts in amendment and incident thereto, for abstraction of the water by the commissioners, and requested them to take the necessary steps for summoning a jury to assess such damages. The commissioners declined to take any steps, and A gave them a further notice, stating that they had refused to agree upon the amount of compensation for obstructing the stream and diverting the water, and requiring them to take the necessary and legal steps pointed out by the Acts 2, Wm. 4, c. 26, 12 Vict., c. 38, or any of them, for determining the amount of compensation to be paid for all or any damage which he was entitled to receive in his own right, or in behalf of the other heirs, as well for the acts of the St. John Water Company as of said commissioners. The commissioners declined to take any proceedings on this application, stating that they were not aware that any damage had been done to A by their operations. Held, On application by A for a mandamus—

1.—That the Commissioners were right in refusing to act on the first notice—the mode of proceeding under the Acts 2, Wm. 4, c. 26, and 12 Vict. c. 51, being by arbitration, and not by a jury.

2.—That the Commissioners had no power to act under the 2, Wm. 4, c. 26, even if they had been requested to take the proceedings pointed out by that Act.

3.—That as all rights and remedies against the Water Company were preserved by the 18 Vic., c. 38, the Commissioners were not bound to apply for a jury to assess damages for the acts of the Water Company, as required by the second notice.

4.—That without showing who the other owners of the property were, and how A. was entitled to claim on their behalf, a mandamus could not be issued to assess the damages due to them, but must be confined to A's interest in the land.

5.—That it was sufficient for A to show by his affidavits a *prima facie* case of title to the land, and that he need not produce his deeds.

6.—That the allegation of the withdrawal from its natural course of a large quantity of water from a stream flowing through A's land, showed a *prima facie* case of damage to him.

7.—That a demand in the alternative, to do one of two things, and a general refusal, was sufficient to fonnd an application for a mandamus, if the applicant was entitled to part of what he claimed.

8.—That a request to a public officer, to take the the necessary and legal steps pointed out by an Act of Assembly, to assess damages for the injury done to the applicants property under the authority of the Act, was sufficiently specific.

9.—That an objection that there had be no sufficient demand could not be taken after the merits of the application had been discussed.

10.—That where an application for a mandamus fails, because there was no demand and refusal, it cannot, as a general rule, be renewed after a a demand; though there may be circumstances warranting a departure from this rule. *Regina* v. *Commissioners of Sewers St. John.* 3

COMMON COUNTS.

See CONTRACT, 8.

CONSIDERATION.

See CONTRACT, 2. DECLARATION, 3.

1. Defendant gave his note payable at a future day, to the plaintiff, for a debt due from A to the plaintiff, A agreeing, in consideration thereof, to convey land to the defendant. A afterwards refused to convey the land. Held, That the giving time for the payment of A's debt was a good consideration for the defendant's promise, and that the plaintiff's knowledge at the time the note was given, of the agreement between the defendant and A, respecting the land, did not affect the plaintiff's right to recover on the note, he not being a party to such agreement. *Moffatt* v. *Duplissey.* 21

2. Under the Registry Act, (1 Rev. Stat., c. 112), a deed from A to B, expressed to be "for and in consideration of the sum of——lawful money of the Province," *habendum* to B, his heirs and assigns, but without any declaration of the use, is a sufficient conveyance of the land to B.

Semble,—That it sufficiently appeared that the consideration of the deed was money; and the amount of consideration being unimportant, that the deed might operate either as a deed of bargain and sale, or as a feoffment. *Wortman* v. *Ayles.* 63

3. M made a promissory note payable to his own order, which he endorsed and gave to his son-in-law, S., as a gift by way of advancement to his daughter, the wife of S. After it was overdue S. transferred it to plaintiff for a valuable consideration.

Held, That the first consideration was not sufficient and that plaintiff having taken it when overdue all equities attached. *Thomas* v. *McLeod.* 598

CONTEMPT.

See NONSUIT, 3.

1. Justices of the Peace acting judicially are Judges of Record, and have power to commit to prison orally without warrant for contempt committed in the face of the Court. *Armstrong* v. *McCaffrey.* 525

They have no power to commit to the lock-up house at Woodstock. *Ibid.*

CONTRACT.

See EVIDENCE, 2, 12, 13,

1. The defendant for value received promised to deliver the plaintiff 30 chaldrons of coal on demand. The only demand on the defendant and the only refusal by him to deliver the coal, was a refusal to allow the plaintiff to put the coal on board a certain vessel of which defendant claimed to be the owner, though he offered to deliver the coal to the plaintiff who refused to receive it, unless he was allowed to put it on board the vessel.

Held, That as there was no contract about the vessel, the defendant's refusal was no breach of the agreement to deliver the coal.

Quære whether such an agreement is within 1 Rev. Stat. c. 116. *Vanbuskirk* v. *Green*. 25

2. Defendant agreed to deliver plaintiff 100 tons of timber, of a specified size and quality, at a certain time. He delivered 101 tons, partly within the time, but not of the size or quality required. Disputes having arisen respecting it, and also as to the defendant's liability to pay the expenses of putting the timber in shipping order, it was agreed between them that if defendant would pay this expen e, the plaintiff would allow the timber at 89 tons at the contract price. In an action for non-delivery of the timber, it was left to the jury, whether the plaintiff had agreed to receive the timber, and waive all claim for damages for breach of the contract; and the jury having found in the affirmative.

Held, No misdirection, and that the performance of the contract being in controversy between the parties, such a settlement was binding—the defendant's agreement to pay for trimming the timber, being a sufficient consideration for the plaintiff's promise.

Semble, That what took place between the parties, might be treated as an accord and satisfaction of the plaintiff's demand. *Turner* v. *Keiver*. 91

3. Where a contract is to be made out partly by written documents and partly by parol evidence, the whole becomes a question for the jury. *Macpherson* v. *The Fredericton Boom Company*. 336

4. Where a contract was made to load a ship for $1.60 per standard by the lump, and part of the load was brought alongside in wood boats, the contract was held not affected by a custom of the port of St. John, that in such a case the amount of the scowage went to the shipper. *McNichol* v. *Peck*. 430

5. Where a party to a contract disables himself from performing it, the other party's right of action for the breach immediately attaches. *Gilbert* v. *Campbell*. 474

6. In an action for breach of defendant's contract to assign certain judgments and mortgages on plaintiff's property to him, the latter cannot recover damages for injury done to his business and credit, in consequence of the sale of his property under a decree in Equity. *Ibid.*

7. A plaintiff in Equity before decree has the power to discontinue his suit, and where a breach of his contract results from his not doing so he is liable. *Ibid.*

8. Plaintiff, by a written agreement sold to defendant for £45, payable part that autumn and balance in one year, the logs on his and his son's land, with the right to cut, for five years. Defendant during the following winter cut and hauled off all the trees suitable for lumber. In the meantime plaintiff conveyed to his brother, who brought an action of trespass against defendant for cutting on the land and recovered damages.

Held, That the plaintiff was entitled to recover the amount, defendant having bound himself to pay on a certain day, and having got the logs.

That the trees being severed, became chattels, and plaintiff's claim doing merely a money demand might be recovered on the common counts. *Murray* v. *Gilbert*. 553

9. S., who was building a ship for plaintiffs, being indebted to them, agreed to transfer the vessel to H., one of the plaintiffs, together with all materials for construction then procured, S., to finish the vessel at his own cost, and rig and equip her with rigging to be provided by plaintiff. The vessel, when finished, to be registered in the name of H. Canvas, cordage and wire were procured by L. at plaintiffs' store; and while being prepared for the vessel were taken by the sheriff under an execution against S., when $150 worth of labor had been expended upon them.

Held, That under the agreement the property in the sails and rigging remained in plaintiffs, and that the fact of the articles being charged to S. in plaintiffs' books was not conclusive to show a sale to S. but was a question for the jury.

That the plaintiff was entitled to recover the value of the sails and rigging when taken. *Rankin et al.* v. *Mitchell*. 499

10. C (plaintiff's mother) and M., daughters of S., were entiled to certain real estate in right of their mother, who died in 1826. S. married again, and subsequently in 1841, made a will whereby he provided that C. and M. should each receive £1000 on their marriage, and that when his youngest son became of age, an equal share with his other children, of his property should be invested for their benefit; after the death of either, her share to be divided amongst her children, the child to represent the parent in any division of property; no share to be deemed to have vested until paid, with the proviso that C. and M. should not be entitled to any benefit under his will unless they ratified his acts relative to their mother's real estate. In 1844, by deed, in consideration of the legacies and provisions made for them by the last will and testament of S., they conveyed to him their real estate. C. married in 1847, and died in 1851. In 1852 S. revoked the provisions in his will in favor of C. bequeathing the plaintiff £1000 on his becoming of age. In 1858 S. died.

Held, 1.—That S could not revoke the provisions in favor of his daughters in his first will, and that the transaction was a contract capable of being enforced in equity.

2. That there was a sufficiently signed contract to satisfy the Statute of Frauds.

3. That the fact of C having received certain advances from S, after her marriage, was no proof to establish a substituted contract.

4. That during coverture C could not enter into a contract to abandon the rights she acquired under the will of S.

5. That the provisions in the will for the benefit of C inured for the benefit of the plaintiff her son.

6. That the plaintiff's infancy was no bar to his enforcing the contract, as he was entitled during infancy to the interest of his mother's share.

7. That in equity a party who intends to rely on the Statute of Frauds must specially plead it or raise the objection in his answer.

8. That under 17 Vict. c. 18, it was not necessary for M to be a party to the suit. *Gilpin* v. *Scovil*. 279

CONTRIBUTORY.

See STOCKHOLDER.

CORPORATION.

See CHURCH CORPORATION.

1. The Corporation of the City of St. John are not bound by their charter, as grantees of the Crown, to build or keep in repair wharves or sea-walls for the protection of the city lands from the sea, and there is no condition, expressed or implied, in their charter requiring them to do so. *Coram* v. *The Mayor, &c., of St. John.* 443

2. A municipal corporation is liable to an action for negligence in the discharge of any duty imposed upon them. *Green* v. *The Mayor, &c., of St. John.* 531

3. The plaintiff, while a passenger on board the ferry-boat, in St. John, was injured by the falling of a pile, which formed part of the approach to the ferry landing. Held, That the defendants, being the owners of the ferry, were liable, and were not relieved by the fact of the ferry being leased to a third party. *Ibid.*

CORPORATE NAME.

Where the notices and orders upon which an action under the Winding-up Act was founded, were entitled "The President, Directors and Company of the Westmorland Bank, in the County of Westmorland,' the corporate name being "The President, Directors and Company of the Westmorland Bank." Held, No mis description, the words being merely an addition of the locality. *McKenzie* v. *Wiswell.* 511

CORONER.

See VENIRE.

COSTS.

1. The Rev. Stat., c. 137, § 43, depriving a plaintiff of costs where he does not recover more than £5, only applies to cases in which Justices of the Peace have jurisdiction; therefore in an action for non-performance of a contract to deliver goods, the plaintiff is entitled to costs without a Judge's order, though he recovers less than that amount. *Rideout* v. *Stevens.* 28

2. A mortgagor was made defendant in a foreclosure suit, appeared thereto and answered, disclaiming any interest in the property. On motion to dismiss the bill as against the mortgagor.

Held, That as the plaintiff either knew or had the means of knowing, before commencing the suit, that the mortgagor had conveyed away his equity of redemption in the property, the mortgagor was entitled to his costs. *Wilson* v. *Hornbrook and Wife, and McKenna.* 167

3. The taxation of costs by the Clerk in Equity under the Act 17 Vict., cap. 18, may be reviewed by a Judge of the Court, and the application may be made by motion, stating the objections to the taxation.

The application is not too late if made at the next sitting of the Court after the costs are taxed, though they were taxed during the sitting of the Court. *Hendricks* v. *Hallet.* 170

4. If the clerk in taxing acts on a wrong principle, the Court will review the taxation. *Ibid.*

5. Costs of abbreviating pleadings and affidavits used in opposing an application for an injunction not allowed in the costs of opposing a second application, the same counsel appearing on both motions, and it not being shown that a second abbreviation had actually been made. *Ibid.*

6. In general payment of costs between co-defendants is not directly ordered, but the plaintiff is ordered to pay the costs to the defendants, to whom they are decreed, and to add them to the general costs in the cause, and recover them from the other defendants. *Johnston* v. *McCartney* 227

7. In a suit for foreclosure of a mortgage, by which the mortgagor, in addition to other property conveyed, assigned a mortgage given to him by M, the plaintiff is not entitled to recover the costs incurred by him in defending a suit for redemption brought against him by the assignee of the redemption of M, in which suit each party was ordered to pay his own costs. *The Bank of New Brunswick* v. *Cronk.* 228

8. Where the defendant challenges the array on the ground of affinity between himself and the sheriff, and the challenge is sustained, defendant is entitled to the costs of the day, as a general rule. *Sirois* v. *Hammond.* 332

9. Where a motion for judgment, as in case of a nonsuit, was pending, the Court discharged, with costs, a motion for costs of the day for the same default. *Stevens* v *Hamilton.* 335

10. In an action by an attorney to recover the amount of a bill of costs incurred in defending defendant against a criminal charge, the bill had been taxed by the clerk, who taxed only such items as the ordinance of fees provided for, and refused to recognize or touch the other items.

Held, That the jury were bound by the clerk's taxation as to the taxable items, and as to the others they might find for the plaintiff for such services as were in the nature of attorney's work, but that plaintiff could not recover for counsel fees.

Quære--Whether if the clerk had followed the English practice and taxed the whole bill it would have been sustained? *Peck* v. *Tingley.* 418

11. Where the plaintiff's bill was dismissed in consequence of usury the Court in appeal refused to interfere with the discretion of the Judge of the Court below, who decided that the costs should follow the result of the suit. *Jardine* v. *McWilliams.* 569

COUNTY COURT.

See INSOLVENT DEBTOR, 2.

CRIMINAL PROCEDURE.

1. The Rev. Stat., c. 159, § 16, by which on a trial for felony the jury is authorized to acquit of the felony, and find a verdict of guilty of a misdemeanor, if the evidence warrants it, establishes a general mode of procedure in all criminal cases, and is not confined to felonies existing at the time of the passing of the Statute; therefore, on an indictment for a felonious assault under the Act 25 Vict., cap. 10, the prisoner may be found guilty

of an assault only. *The Queen* v. *Thomas Ryan and John Ryan.* 116

2. Where a bill of indictment laid before the Grand Jury was returned by them into Court with an indorsement "The Grand Jury recommend no bill," and it is entered in the Minutes of the Court as "no bill,' and no further proceedings are taken against the party, it is a termination of the prosecution. *Alward* v. *Sharp.* 286

CUSTOMS DUTIES.

Certain liquors manufactured in Ontario, prior to July, 1867, warehoused for exportation and having paid no excise duty, were exported to Portland, U. S., where they were landed and immediately exported to St. John, N. B., where they arrived after the British North America Act came into force, being under the control of the Customs authorities during the whole period of transit until they left Portland.

Held, That by passing through the United States they did not become foreign goods, and were entitled to be admitted free of duty, under the 121st section of the British North America Act.

That coming from a foreign country they were *prima facie* foreign goods, and the burden of proving that they were not so, to the reasonable satisfaction of the Custom House authorities, was on the importer. *Kinnear and another* v. *Robinson.* 568

D

DAMAGES.

See REASONABLE TO PROBABLE CAUSE, 1. CONTRACT, 6, 9.

1. In trespass for cutting a net with which the plaintiff was fishing in a public navigable river, where the defendant claimed an exclusive right to fish, as owner of the adjoining land, the jury gave a verdict for $40. Held, That the damages were not excessive, though the plaintiff stated the actual damage to the net did not exceed $2. *Rose* v. *Belyea.* 109

2. In trespass against several, two of the defendants left after being forbidden by the plaintiff, and did not again enter on the land, or take part in the subsequent trespass; the plaintiff's counsel elected to go against all the defendants for the trespasses proved. Held, That the damages were properly confined to the trespasses committed before the two defendants left the land. *McMillan* v. *Fairley and others.* 325

3. In an action against a surgeon for negligence in treating a patient, whereby it was alleged that he lost his hands and feet, a verdict was given for the plaintiff for $25,000. Held, That the damages were excessive, the jury having found, that without any negligence, the plaintiff would have lost a portion of his hands. In such a case, the Court ordered a new trial, though the plaintiff was willing to assent to reduce the amount of the verdict. *Key* v. *Thomson.* 295

4. In an action for wrongful detention of timber in a boom, the plaintiff is entitled to recover damages for the loss sustained, by reason of a fall in the market, between the time the timber should have been delivered and the time it was actually delivered. *Godard* v. *The Fredericton Boom Company.* 554

5. Where the jury do not appear to have assessed the damages on a wrong principle or acted under the influence of improper motives or bias, the Court will not disturb their finding, even if the damages are larger than they might have been disposed to give as jurors. *Ibid.*

DEATH OF A PARTY.

See AMENDMENT, 1.

DEBT.

A bequest by a debtor to his creditor, of a legacy to the amount of the debt, payable out of the proceeds of certain property, which remains unsold, is no defence to an action by the creditor for his debt. *Bishop* v. *Robinson.* 68

DECLARATION.

See CONTRACT, 8.

1. The declaration in an action for excessive distress, alleged that the plaintiff held land as a tenant to defendant at a certain rent; that the defendant wrongfully seized goods on the premises as a distress for arrears of rent alleged to be due, viz: $311, and sold same for the said alleged arrears, whereas a small part only of the said alleged rent, viz., $70, was in arrear. There was no allegation that more goods were taken or sold than were necessary to produce the rent actually due. Held, That the declaration disclosed no cause of action; that some rent being due, the distress itself was not a wrong, and that the mere distraining and selling on a claim of more than was due, was not actionable. *Preston* v. *Simonds.* 44

2. A declaration alleging that the plaintiff was a married woman, living separate and apart from her husband, and compelled to support herself, and that the defendant contracted with her while she was such married woman and compelled to support herself, sufficiently shews the plaintiff's right to sue in her own name under the act. *Abel* v. *Light.* 97

3. The first count of a declaration stated that on the 1st November, 1865, in consideration of the assignment of license No. 84, made to defendant by plaintiff, at defendant's request, defendant undertook and promised that F. should deliver to plaintiff whatever quantity, say, not to exceed 165,000 ft. of logs by the 10th July then next.—Averment, that although the time for the delivery of the logs had elapsed, and the plaintiff was ready and willing to receive them, yet F. did not deliver them, whereby, &c.

The fourth count stated that on the day and year aforesaid, in consideration of the assignment by the plaintiff to the defendant of a certain license, then and there agreed upon between them, defendant undertook and promised that F. should deliver plaintiff whatever quantity of logs said F. had before then agreed to deliver plaintiff in the year 1866, not to exceed 165,000 feet, by the 10th July then next.—Averment, that F. had agreed to deliver plaintiff 135,000 feet in 1866. Breach, —that F. did not deliver the logs.

Held, 1st. That a sufficient consideration for defendant's promise was alleged, but that the promise, as stated in the first count, was uncertain and unintelligible. 2nd. That the words, "on the day and year aforesaid," in the fourth count, did not necessarily refer to the 10th July, 1866, (the last day mentioned in the preceding count), but

might refer to the 1st November, 1865; and being only an ambiguity, the objection could not be taken on general demurrer. *DesBrisay* v. *McLeod.* 122

4. Plaintiff agreed, in writing, to deliver the defendant 100,000 feet of logs in his boom, on condition that the defendant would deliver the plaintiff a like quantity out of the defendant's logs at another place, and if there was any overplus of plaintiff's logs, that defendant should pay him for them at a certain rate. The plaintiff received 100,000 from the defendant and delivered him about 155,000. Held, That the price of the overplus could be recovered on the count for goods sold and delivered. *Leslie* v. *Hanson.* 263

DEED.

See CONSIDERATION, 2. ESTOPPEL, 1. EVIDENCE, 18, 26.

1. The deed of a lunatic is not absolutely void but voidable, and can only be avoided by the grantor or his representatives. *Doe dem. Hickman* v. *King.* 330

DELIVERY.

See TRANSFER, 1, 2.

A. agreed in writing to cut 100 M. feet of logs on land of which he had the permit, and deliver them to the plaintiff in the following spring, the logs to be the property of the plaintiff; and that plaintiff might at any time take possession of the logs and sell them, and after deducting from the price the amount of his supplies, and all expenses he might be put to with them, to pay the balance, if any, to A. Held, That without a delivery, or some act done by the plaintiff under the agreement, he had no property in the logs cut thereunder by A. *Tompkins* v. *Tibbits.* 317

DELAY.

See CERTIORARI, 1.

DEMURRER.

See DECLARATION, 3.

DEMAND AND REFUSAL.

See CONTRACT, 1. COMMISSIONER, 3.

DEVIATION.

See INSURANCE, 4, 5.

DISCONTINUANCE.

See JUDGMENT AS IN CASE OF NONSUIT, 1. CONTRACT, 7.

DIVERSION OF STREAM.

See LAND DAMAGES.

E

EJECTMENT.

See NEW TRIAL, 1.

1. It is a sufficient defence in an action of ejectment, to prove title out of the lessor of the plaintiff. *Doe ex dem. McGowan* v. *McColgan.* 542

2. Where the lessor of the plaintiff derives his title from his ancestor, acquired by the Statute of Limitations, it is sufficient to prove, for the defence, that such ancestor paid rent for the *locus in quo*, while the statute was running. *Ibid.*

ENTRY.

See PRACTICE, 6.

ESTOPPEL.

See EVIDENCE—PROMISSORY NOTE, 5.

1. By agreement, under seal, between the plaintiff and B., the latter agreed to purchase a vessel, then building by the plaintiff, and to pay him a certain sum per ton when the vessel was launched, $1,400 which had been advanced to the plaintiff, to be deducted from the purchase money. In an action on the agreement for the price of the vessel, the defendant, under notice of set-off, claimed payment for goods delivered to the plaintiff, subsequent to the agreement.

Held, That the plaintiff was not estopped by the agreement from showing, in answer to the set-off, that the goods were not delivered as an additional payment on account of the vessel, or as a sale, but on account of the $1,400, which sum was not paid at the date of agreement. *Bishop* v. *Robinson and others, Executors of C. E. Bishop.* 68

2. The sureties in a recognizance entered into under the Rev. Stat. c. 98, "Of Controverted Elections," cannot plead, that they entered into it by a fraudulent representation of the nature of it, believing it to be the obligation of the principal only. *The Queen* v. *Sparrow and others.* 113

3. If the recognizance was obtained by fraud, the sureties should apply to the Court to vacate it; but while it stands as a record, they are estopped from denying the truth of it. *Ibid.*

4. Where property claimed by the plaintiff is seized by an execution against A., and the plaintiff forbids the sale, he is not, by purchasing at the sheriff's sale, estopped from denying that it was A's property. *Pelton* v. *Temple.* 274

5. After a conveyance of land made by a person of unsound mind, a tenant for years, of the land paid rent to the grantee. Held, After the death of the tenant that his widow was estopped by the payment of rent, from denying the title of the grantee. *Doe dem. Hickman* v. *King.* 330

6. Where a party makes a representation to another, with reference to the title to lands, which induces him to alter his previous position and advance money upon them, he is estopped from denying the truth of such representation *Armstrong* v. *Bridges.* 498

7. S. B. went into possession of a lot of Crown land in 1832, of which his brother, J. H. B., obtained a grant in 1834, the purchase money and cost of survey being paid by S. B., and J. H. B. never made an entry. S. B. died in 1852, devising it in lots to his sons R., W. and T., who went into possession. T. mortgaged his share and sold the equity of redemption and his title became vested in plaintiff.

Held, That R and W, having gone into possession under their father's will, were estopped from setting up a new title, and that as against the heirs of J H B the Statute of Limitations did not begin to run until the grant issued. *Ibid.*

EVIDENCE.

See ESTOPPEL, 1. WILL, 4. CONTRACT, 9. CUSTOMS DUTIES, 1. COMMISSIONER, 3.

Defendant lost a cow, which he suspected to have been stolen by the plaintiff; he reported the facts to the Chief of the Police, who told him, in the presence of a policeman, that he had better arrest the plaintiff. He then went to the plaintiff's shop with the policeman, and directed him to take the plaintiff in charge, and the policeman arrested the plaintiff and detained him several hours, when the cow was found, having strayed from the defendant's field. In an action for false imprisonment, the policeman stated, in answer to a question from the plaintiff's counsel, that he would not have arrested the plaintiff without the direction from the defendant. Held, That the question was proper. *Quære*, whether the defendant's counsel had a right to aske the policeman on cross-examination, whether he did not make the arrest, in consequence of the direction from the Chief of the Police. Though the evidence was improperly rejected, it is no ground for a new trial, as the defendant, being a trespasser, by directing the arrest, the verdict must have been in favor of the plaintiff. *Foley* v. *Tucker*. 52

2. Defendant agreed, in writing, to deliver plaintiff a quantity of logs, for which the plaintiff agreed to pay him, after paying the amount of the defendant's account due the plaintiff, at the rate of 16 shillings per thousand feet.

Held, In an action on this agreement, that parol evidence was admissable on the part of the defendant, to show what the account referred to in the agreement was, and to identify an account rendered to him by the plaintiff, as the account so referred to. *DesBrisay* v. *Gleneross*. 104

3. Logs were measured as they were sawed in a mill, and their contents marked on a board by the persons who sawed them. At the end of each week, the figures on the board were transcribed into a book by a person who had made a part of the measurements, but who could not tell, from the character of the figures on the board, what portion of them was made by either of the other parties. Held, That the book was not evidence to prove the quantity of logs sawn, without calling all the persons who had measured the logs. *Leslie* v. *Hanson*. 263

4. In an action to recover the price of logs, the plaintiff, in order to prove the quantity received by the defendant, shewed the average size and number of logs put in and driven down a stream, at the mouth of which defendant had a saw mill, and that the defendant had sawn a portion of them. Held, In the absence of any evidence by the defendant of the quantity he had sawn, that the jury were justified in presuming he had received the whole quantity driven down the stream by the plaintiff. *Ibid.*

5. In trespass for impounding cattle, the defendant pleaded "not guilty," and at the trial his counsel opened a defence, justifying impounding the cattle *damage feasant* and examined several witnesses to prove it, the plaintiff's counsel then objected that the evidence was not admissible under the plea; but further evidence was received, and the defendant obtained a verdict. The Court refused a new trial on the ground of the improper admission of the evidence, the damage, if any, being very small. *Quære*, whether the plaintiff had not waived the objection, by not taking it before the defendant gave any evidence of justification *Campbell* v. *Wheeler*. 269

6. In an action by partners, brought after the act allowing parties in a cause to be examined as witnesses, it is not necessaay to call the plaintiffs to prove the partnership: it may be proved by other evidence. *Rankine & others*, v. *Harley*. 271

7. Evidence of a witness who had dealt with all the plaintiffs as partners, and purchased goods and settled accounts with the firm for several years. Held, Sufficient to prove partnership. *Ibid.*

8. In trespass, the plaintiff's counsel opened a case of absolute property in the plaintiff, but proved that the property was delivered to him as security for a debt. Held, Sufficient to entitle the plaintiff to recover. *Pelton* v. *Temple*. 274

9. It is discretionary with the Judge at the trial to allow counsel to with draw evidence. Per *Ritchie, C. J.*, that where evidence is admitted against the opinion of the Judge, it ought not to be withdrawn. *Ibid.*

10. Matter of justification in trespass, cannot be given in evidence in mitigation of damages, under the general issue. *Condell* v. *Price*. 332

11. Where a written lease of a farm excepted a part of it, described as lot No. 2, parol evidence is inadmissiable to show that it was agreed between the parties at the time of the bargain, that the tenant should also occupy lot No. 2. *McElrency* v. *McKilligan*. 322

12. One item in an account of money paid by the plaintiff for the defendant, appeared on cross-examination to have been paid under a written agreement by the defendant to deliver goods to the plaintiff. Held, That without production of the agreement the plaintiff could not recover on this item. *Harley* v. *Gookfellow*. 335

13. Where a plaintiff stated in evidence that he claimed property under a written agreement which was not produced, but a letter was put in evidence which, with other facts, were sufficient to vest the property in the plaintiff, and the jury were directed that without such letter and subsequent facts the plaintiff had shown no right to the property, the non-production of the written agreement was held immaterial. *McPherson* v. *Fredericton Boom Company*. 336

14. In an action against the defendant for negligence as a surgeon, in his treatment of the plaintiff, whose hands and feet had been amputated in consequence of his having been frozen, it was proved by the plaintiff that when the defendant first visited him, he said that the plaintiff would not lose any of his limbs. Held, That a statement made by the defendant on the same occasion, to another person in the house where the plaintiff was, that he would lose his hands and feet, was evidence for the defendant as part of the *res gestæ* it appearing that his practice was always to encourage his patients, and prevent a depression of their spirits. *Key* v. *Thomson*. 295

15. When the plaintiff gives the evidence of medical men as to the proper treatment of cases of frozen limbs, the necessity of frequent visits, and their practice in particular cases; the defendant may give evidence of the treatment of other

cases of a similar character, and of the results, in order to rebut the inference of negligence arising from the evidence on the part of the plaintiff. *Ibid.*

16. When evidence is tendered, the Judge has a right to ask the particular purpose for which it is offered, and if the counsel refuses to state it, he may reject it. *Ibid.*

17. Where a witness on cross-examination, denied having signed a paper, but which was not then shown to him, and the opposite party afterwards produced the paper, and gave evidence to prove the witness' signature to it, the witness may be re-called to disprove the signature. *Tonapkins* v. *Tibbits.* 317

18. Where a Sheriff's deed, and his affidavit of due execution and sale bear different dates parol evidence is admissible to prove that they were executed on the same day. *Doe ex dem. Connell* v. *Dickinson.* 459

19. The sufficiency of preliminary evidence of the loss of a document to entitle secondary evidence to be received is a question for the Judge at the trial to determine. *Gilbert* v. *Campbell.* 474

20 Where a commission for the examination of witnesses abroad was issued directing the depositions to be taken before four commissioners, one of whom, though notified, did not attend, and the commission was executed by the other three, in the absence of any protest at the time, or suggestion that defendant had been injured by its execution by three only, and where he had an opportunity of applying, at term, to suppress the depositions, the Court held that the objection was waived and it was too late to object to their reception in evidence at the trial. *Ibid.*

21. A party cannot make evidence for himself by a letter written to the opposite party, containing a statement of the damage he has sustained by reason of that party's breach of contract, and a letter written to plaintiff by his attorney containing a statement of the damages plaintiff had sustained from defendant's breach of contract, is inadmissible in evidence. *Ibid.*

22. An application was made on behalf of B. to compel the sheriff to pay over a sum of money deposited by him in lieu of bail in certain suits in which S. was arrested, but in which he had since been rendered. B's affidavit set forth that the sheriff agreed, when the money was deposited, to return it if S's was rendered. This statement sheriff denied, alleging that he gave a receipt to B., and that the creditors of S., who were proceeding against him, udder Absconding Debtors' Act, claimed the money as the property of S.

Held, That the receipt not being produced, and the evidence being conflicting, the Court would not grant the application. *Oulton* v. *Scovil.* 502

23. An affidavit made by a attorney, that the lessor of the plaintiff resides in Halifax, N. S., had never been in this Province, had not the deed in his possession, and did not know where it was to be found, is not sufficient to entitle a certified copy of the deed to be given in evidence under 1 Rev. Stat., cap. 112, § 12. Fisher, J., *dissentiente. Doe ex dem. Trider* v. *McIntosh.* 505

24. Where no proof was given that the deed was ever in defendant's possession, and no notice to produce to defendant, secondary evidence by a certified copy is inadmissible. *Ibid.*

25. Where, on the cross-examination of plaintiff, the defendant's counsel examined him as to the time he entered into a partnership, and his interest in it, the plaintiff was held to be entitled to go into the contents of the whole agreement, although it appeared there were written articles. *Tozer* v. *Hutchison.* 548

26. Plaintiff and M built a vessel, of which defendant became master, purchasing a sixteenth from M and a sixteenth from plaintiff, which he did not pay for. The vessel being in difficulties at Boston, U. S., and $1,240 due defendant for wages, he, in consideration of $1,000, by deed of sale transferred to plaintiff all his right in the vessel, and released all claim on account of wages.

Held, In an action to recover the price of the sixteenth, that parol evidence was admissible to prove that plaintiff, at the time of the deed being executed by defendant, verbally agreed to renounce all claim to the purchase money. *Lingley* v. *Smith.* 600

27. A Judge's order settling the list of contributories, under the Winding-up Act, is only *prima facie* evidence of liability, and the defendant may give evidence at the trial to shew that he is not a stockholder. *McKenzie, Curator of the Westmorland Bank* v. *Seaman.* 632

EXCESSIVE DISTRESS.

See DECLARATION, 1.

EXECUTION.

See TRESPASS, 3. LEVY, 1.

1. Where the debtor points out property to the constable to levy on, it is his duty to seize it, unless he has reasonable ground for believing that it does not belong to the debtor; and this question should be left to the jury. *Hunter* v. *Maddox.* 162

2. Plaintiff obtained a license to cut logs, and agreed with A to cut and haul the logs, put the plaintiff's mark on them and take them to the mouth of the Oromocto for him; plaintiff to furnish the supplies, pay the wages, and sell the logs at St. John; and after deducting stumpage, freight; supplies, &c., pay A any balance that might remain. Held, That A had no interest in the logs that could be seized under execution. *Noble* v. *Temple. Pelton* v. *Temple.* 274

3. When a husband and wife reside on land of which the wife has the fee, the husband is tenant by the courtesy, and the crops raised by his labor and the labor of his servants and children, are his and liable to seizure for his debts, and the sheriff may enter to make a levy. In the absence of title, the possession is the possession of the husband. *Pourrier and Wife* v. *Raymond.* 520

EXECUTOR.

See ADMINISTRATOR, 1.

F

FALSE STATEMENT.

See INSURANCE, 3.

FISHERY.

The right of fishing in a public navigable river belongs to the public, and not to the owners of the lands bounded on the river. *Ross* v. *Belyea.* 109

FORMER DECISION.

1. Where it appeared to the Court that a former decision was inconsistent with the right application of a clear and well established principle of law, it reversed the former decision without the intervention of a Court of Appeal. Allen, J., without differing from the re t of the Court as to the principle of law, thought that the Court having, in Calhoun's case, decided that persons were not disqualified from acting as commissioners by reason of being land owners, the Court was bound by that decision until reversed by a Court of Appeal. *Regina* v. *Commissioners of Sewers, Germantown Lake.* 341

FOREIGN GOODS.

See CUSTOMS DUTIES, 1.

FOREIGN LAW.

1. Plaintiff became surety for defendant as administrator in Massachusetts, and joined him in an administration bond to the Judge of Probates. On passing his accounts in the Probate Court, a balance belonging to the estate was found to be in his hands, unaccounted for, whereby the bond was forfeited. Defendant then resigned the office of administrator without paying over the amount due, and the plaintiff was thereupon appointed administrator *de bonis non.*

In an action in this Province for money paid by the plaintiff to the defendant's use—the plaintiff s claim being a liability to the estate, as security in the bond for the amount due by the defendant, and not an *actual* payment—it was proved that such an action was sustainable in Massachusetts by the law of that country, the amount for which the security was liable being considered as paid by operation of law on his appointment as administrator.

Held, That for the purpose of administering the foreign law, the action was maintainable here. *Valentine* v. *Hazleton.* 110

G

GIVING TIME.

See BOND, 1.

I

INDICTMENT.

See ASSAULT, 1.

INFANCY.

See CONTRACT. 10.

INJUNCTION.

1. When an injunction had been granted *ex parte* to restrain an administrator from selling land under a license granted by the Probate Court, on the ground that he had sold property under a former license under value, and had sufficient property in his hands to pay the debts, an application to dissolve the injunction was refused till the defendant had answered, it not being clearly shown by his affidavits that he had not a portion of the estate in his possession which belonged to the heirs. *Coy* v. *Coy.* 177

INSOLVENCY.

1. An Act which provides for the examination of a debtor before a judge, as to his ability to pay his debts, and for his discharge from gaol, or the limits as to the suit for which he was confined, where his inability to pay is shewn, and where he has made no fraudulent transfer or undue preference, is an Insolvent Act which the Legislature of New Brunswick has no power to pass since the British North America Act, 1867, came in force, and the assent of the Governor General will not make it valid. *The Queen* v. *Chandler, in re Hazleton.* 556

INSOLVENT DEBTOR.

1. Where Justices make an order for suppoat under the Insolvent Debtors' Act—(1 Rev. Stat. c. 124)—and it appears by the examination of the debtor that he has given an undue preference to one of his creditors—this Court has power to quash the order. *McDonald* v. *Watt.* 24

2. A Judge of the County Court may examine and make his order for the support or discharge of any debtor, in any County within his district, even if the debtor has been arrested and is in gaol, or on the limits in another county in his district *Ex parte Jardine.* 582

3. Where the creditor s attorney was in Court, and heard the order for support made, notice of it is not required. *Ibid.*

INSURANCE.

1. A vessel was driven on shore, and being supposed to be a total loss, notice of abandonment was given to the underwriters. They refused to accept the abandonment, got the vessel off, brought her to St. John, her port of destination, in a place of safety, before action brought, and required the owner to take charge of her. The cost of repairing her after she was brought to St. John by the underwriters, would be less than her value when repaired.

Held, That the right of the assured to recover depended upon the state of facts existing at the time the action was brought, and that he could only recover for a partial loss. *Taylor* v. *Smith.* 120

2. A house was insured for £250, and proved to have been worth at least £400. Held, That if the plaintiff was only entitled, as widow, to half the estate, there was not an over valuation. *Lingley* v. *Queen Insurance Company.* 280

3. A condition of a policy of insurance on clothing, provisions, &c., in St. John, required that persons sustaining loss should forthwith give notice thereof to the company, and within fourteen days thereafter deliver in as particular an account of the loss as the nature and circumstances of the case will admit of, and make proof of the same, &c., and if there appeared any fraud or false statement, or that the fire happened by the wilful means, or connivance of the insured, he should be excluded from all benefit under the policy. The plaintiff s affidavit furnished to the company under this condition, claiming a loss of furs, clothing, and bedding, by fire, stated that he was in the County of Sunbury at the time of the fire, and was unable to ascertain in what manner it originated. In his evidence on the trial, the plaintiff swore that he left St. John about seven o'clock p. m., on his way to the County of Sun-

bury, where he arrived the following morning; the fire broke out at nine o'clock, at which time the plaintiff would have been in the County of Kings, on his way to Sunbury and only a few miles from St. John. The house was locked when the fire was discovered, and on being broken open it was found to be in a room in which there was neither fire-place nor stove, and no appearance of any clothing or bedding; a candlestick was found in a barrel in this room, containing straw partly consumed. Held, That it was the duty of the plaintiff to state in his affidavit, that the house was locked at the time of the fire, the circumstances connected with his leaving, and where he was at the time, and that his statement that he was in the County of Sunbury, was a false statement and avoided the policy.

Held, also, That an account of the loss delivered within fourteen days after knowledge thereof by the assured was in time, though more than fourteen days had elapsed since the fire. *Smith* v. *the Queen Insurance Company.* 311

4. A ship was insured for a voyage from Liverpool to Cardiff, thence to Aden, and from thence to India or Burmah. She was chartered for and set sail from Cardiff to Aden, with the intention of proceeding from Aden to Chincha, instead of India or Burmah, and was lost before reaching Aden. Held, No deviation, and that the underwriter was liable. *Reed and another* v. *Weldon.* 460

5. A ship was insured for a voyage from Dundee to St. John, N. B., thence to a port of discharge in the United Kingdom. She started on her voyage and arrived at St. John, where she was put on the blocks, detained seventeen days, repaired and reclassed. Held, That this changed the risk, was equivalent to a deviation, and avoided the policy. *Ibid.*

6. Whether delay in a voyage is unjustifiable or not, is a question of law for the Judge; but whether unreasonable or not, is a question for the jury. *Ibid.*

7. Plaintiffs applied to defendants on November 12th to insure their vessel on a time policy for six months, beginning on the 9th September previous, the day on which she left Swansea for St. Thomas, where she was then over-due. In the written application in reply to the question "where bound," the plaintiff's reply was "a port in the West Indies." The news of a hurricane having occurred at St. Thomas had been published in the newspapers that morning, and was known to plaintiffs but not to defendants. Held, In an action to recover for a total loss, that the destination of the vessel and the fact of their being a hurricane at her port of destination should have been communicated to defendants, and this not having been done the plaintiffs were nonsuited. *Mahoney* v. *The Provincial Insurance Company.* 633

8. Plaintiff's premises were insured in The London and Liverpool Company, from 2nd October, 1865, to 2nd October, 1866. Before the term expired he received notice from W, the agent at Newcastle, that the London and Liverpool Company would renew the policy on the same terms, and accordingly he paid W the premium money and got his receipt. A, the general agent at St. John, declined to renew the policy, and paid the premium to defendants who issued a policy (taking the description of the premises from the London and Liverpool's books) dated the 16th October, 1866, but insuring from the 2nd October, 1866 to 2nd October, 1867. The premises were destroyed by fire on the 13th October, before the policy issued; but the plaintiff did not know that he was insured by defendants until he received the policy from W, who also acted for them.

Held, That this amounted to a re-insurance, and there being no fraud plaintiff was entitled to recover; that the policy related back to the 2nd October, and that the condition in the policy, that all facts relating to the state of the premises must be disclosed, must be taken to relate to the time from which the policy took effect. *Giffard* v. *The Queen Insurance Company.* 432

INSURANCE BROKER.

1. Policies of insurance effected by a broker, declared that preliminary proof and evidence of the loss were to be given to the broker, and payment of losses to be made within sixty days thereafter. The practice of the broker was to receive the premiums in money or notes, crediting the underwriters with the amount, whether actually paid or not, the assured being liable to him alone for the premium. Proofs of losses were furnished to the broker from time to time, and on being satisfied of their correctness, he paid the amounts, and the policies were cancelled. Half yearly accounts were furnished by the broker to the underwriter, containing full particulars of all the risks, premiums, losses and charges, to which he made no objection until the account was rendered shewing the balance claimed in this action.

Held, In an action against the underwriter to recover the amount paid by the broker for losses, that the jury were warranted in inferring that the defendant had authorized the broker to decide upon the proof of loss in each case, and had assented to his decision.

Held, Also, that the plaintiff could recover from the defendant the amount of premium of a re-insurance effected for him without proof of actual payment to the underwriter. *Ramney* v. *Gregory.* 152

INSURABLE INTEREST.

A widow having continued, for four years after her husband's death, in possession of a house built on land of which he was the lessee for years, and paid the ground rent, insured the house in her own name. No administration was taken out on the husband's estate. Held, That she had an insurable interest--1st as the presumptive owner of the house; 2nd, as executrix *de son tort;* 3rd, as the widow under the statute of distribution. *Lingley* v. *The Queen Insurance Company.* 290

INTERLOCUTORY JUDGEMENT.

See AGENT, 1.

J

JUDGMENT AS IN CASE OF NONSUITS.

See PRACTICE, 6. COSTS, 9.

1. Service of a rule to discontinue, without payment of the costs, will not prevent the defendant from obtaining judgment as in case of a nonsuit. *White* v. *Barton.* 1

2. Where the plaintiff countermanded notice of trial twice; first because the presiding Judge was

incapable, by interest, from trying the cause; and secondly, in consequence of the absence of his counsel from the country, the Court discharged a rule for judgment, as in case of a nonsuit, on his giving a peremptory undertaking. *Shepherd* v. *Hallett*. 43

3. In answer to an application for judgment as in case of a nonsuit, where the array had been challenged at the trial and the panel quashed in consequence of the sheriff being related to defendant, the plaintiff's attorney stated that he did not issue a venire to the coroner in consequence of a statement of the defendant's attorney leading him to believe that there was no relationship between the sheriff and defendant. The Court ordered the application to stand over in order that the defendant's attorney might answer the affidavit. *Hoyt* v. *Stockton*. 327

JUDICIAL NOTICE.

1. The Court cannot take judicial notice that a vessel lying "near the mouth of Richibucto Harbor" is in the County of Kent. *DesBrisay* v. *The Commissioners of the E. & N. A. Railway*. 48

2. The Court cannot take judicial notice that the per on who signs a certificate of registry, endorsed upon a deed, was not the registrar at the time the deed was recorded; and in the absence of any such proof, it must be presumed that the Registrar rightly certified.

A certificate dated in 1866, stated that the deed had been registered the 29th April, 1836. *Quære*, whether the certificate should not have been made at the time the deed was registered. *Doe on the demise of Robinson* v. *Chassey*. 50

JURISDICTION.

See COSTS, 1. PROBATE COURT, 1. BASTARDY, 2.

Semble, That the Court of Equity has power to supervise the proceedings of Trustees of absconding debtors appointed under the 1 Rev. Stat. c. 125, and to open and examine accounts adjusted by them; but it will not interfere where there is no fraud, and the proceedings of the Trustees haves been regular and no special ground is stated. *Outhouse* v. *Hickman and others*. 38

JURY.

See CHALLENGE, 1.

JURY OF VIEW.

Where a jury of view supped and slept at the plaintiff s house after completing the view. Held, No ground for disturbing a verdict for the plaintiff, it appearing that no communication respecting the suit had taken place between the plaintiff and the jury; that there was no inn within ten miles of the place, and no house near except the plaintiff's and his son's, where all the jury could be accommodated; that the jury were taken to the plaintiff's house by the Deputy Sheriff, who attended them, and who objected to their separating; and there was no complaint that the verdict was against evidence. *Spence* v. *Trenholm*. 77

JUSTICE OF PEACE.

See NOTICE OF ACTION, 1. MANDAMUS, 1.

1. Defendant made complaint before a Magistrate that the plaintiff had threatened to shoot him, whereupon a warrant was issued and the plaintiff arrested and brought before the Magistrate, who, after hearing the parties dismissed the complaint.

Held, In an action for malicious prosecution, that there was a termination of the proceedings before the Magistrate. *Wasson* v. *Taylor*. 102

2. The trial of a civil suit by a Justice of the Peace is an "Official Act." and he is entitled to notice under the Rrevised Statt tes, cap. 129, before bringing an action against him for wrongfully proceeding in the suit. *Pickett* v. *Perkins*. 131

3. The judgment of an inferior Court, involving a question of jurisdiction, is not conclusive: therefore a justice of the Peace is liable in an action of trespass for issuing an execution on a judgment recovered before him, in a case in which he had no jurisdiction, because the title to land came in question, though the judgment remains unreversed. *Ibid*.

L.

LANDLORD AND TENANT.

See RIGHT OF WAY, 1.

LEVY.

Where a *fi fa*. was delivered to the sheriff for the purpose of binding defendant's lands and not for the purpose of a sale, and the sheriff merely informed defendant that he had the execution and endorsed a levy upon it, and did no other act for more than five years, when he advertised the land for sale, the Court set the levy aside without costs. *Hamilton* v. *Bryson*. 629

LIMIT BOND.

See PRACTICE, 3.

LAND DAMAGES.

A stream diverted into a new channel by the Commissioners of the European and North American Railway, under 19 Vict. c. 17, became obstructed in consequence of the new channel filling up and overflowed plaintiff's land.

Held, 1. That the commissioners were bound to keep the channel open, and were liable to an action for the damage to plaintiff's land.

2. That the fact of the plaintiff having been paid by the Commissioners, land damages for the diversion of the stream, was no bar to his recovering damages for their subsequent neglect to keep the channel open.

3. The Act of Canada, which superseded the Commissioners, did not take away the right of action against them where the cause arose prior to the passing of the Act. *McLeod* v. *The Commissioners of the European and North American Railway*. 584

LUNATIC.

See DEED, 1.

M.

MALICIOUS PROSECUTION.

See REASONABLE AND PROBABLE CAUSE.

1. Any motive for a prosecution, other than that of wishing to bring a guilty party to justice, is evi-

dence of malice. Retaining the Clerk of the Peace to prosecute an indictment against the plaintiff, before the Sessions, together with the conduct of the prosecutor before and after, are proper matters to be left to the jury on the question of malice. *Alward* v. *Sharp*. 286

2. It is not essential to the maintenance of an action for malicious prosecution for a crime; that a warrant should have been issued against the plaintiff and that he should have been arrested. It is sufficient that he has been proceeded against by summons on the defendant's complaint. Where the declaration alleged that a warrant had been issued against the plaintiff, and that he had been arrested on the charge, an amendment was allowed substituting therefor, that a summons had been issued by a Justice of the Peace and served upon the plaintiff, and that he attended before the Justice in obedience thereto. *Vincent* v. *West*. 290

MANDAMUS.

See COMMISSIONER, 3.

Where a magistrate commenced the examination of a party on a criminal charge, and after hearing a portion of the evidence refused to proceed with it further, the Court refused to grant a *mandamus* at the instance of a private prosecutor to compel him to do so. *The Queen* v. *Duvaney*. 581

MANURE.

See CHATTEL, 1.

MASTER AND SERVANT.

Plaintiff was engaged by defendant for two years as clerk, and shortly afterwards entered into partnership with other parties for the purpose of carrying on the same kind of business as his employer. Held, That this was such a breach of duty as would justify his dismissal. *Tozer* v. *Hutchison*. 548

MILL DAM.

In an action for overflowing land, the plaintiff alleged the injury to have been done by the defendant's raising a mill dam, and thereby overflowing more land than the dam originally did. It appeared, on cross-examination of one of the defendant's witnesses, that he had worked the mill for a longer time during the summer than the former owner did. The jury were directed, that if, by the original dam, and the way it was used, the land was overflowed only in a particular manner and at particular seasons, and the defendant had within twenty years used the dam differently, and overflowed the land in a different manner and at different seasons of the year, the plaintiff should recover. The jury having found for the defendant—Held, That the direction was right. *Lawlor* v. *Potter*. 328

MORTGAGE.

See BILL IN EQUITY, 2.

A., the father, and B. and C., his sons, being joint owners of two lots of land, mortgaged them to the plaintiff. A. afterwards conveyed to the plaintiff land of which he was sole owner, in payment of half the mortgage debt, and then released all his interest in the mortgaged lands to B. and C., who occupied the land in common for several years, and made several joint payments to the mortgagee on account of the mortgage debt. B. and C. afterwards divided the land equally between them by deed of partition. In a suit for foreclosure of the mortgage, B. claimed that as between himself and C., his portion of the land had been released by the mortgagee at the time A. conveyed the land to him, and that C's lot should be first sold to satisfy the mortgage.

Held, 1st, That in the absence of any written agreement by the mortgagee, the whole of the land remained equally liable to the mortgage, and should be sold in one lot. 2nd. That if a verbal agreement, and the appropriation of the payment by A., would be sufficient to release a particular part of the mortgaged lands, it would not bind C. who was no party to it. 3rd. That the subsequent partition of the land between B. and C. in ignorance by the latter of the agreement, by which the portion of the land allotted to B. was to be released from the mortgage, was a fraud upon C. and that such an agreement would not be carried out for B's benefit. *Johnston* v. *McCartney and others*. 220

N

NAVIGABLE RIVER.

See FISHERY, 1. DAMAGES, 1.

NEGLIGENCE.

See EVIDENCE, 14, 15, 16. DAMAGES, 3.

NEW TRIAL.

See PRACTICE, 1.

1. Where the verdict is against evidence in an action of ejectment, and the Statute of Limitations may defeat the plaintiff before he can bring a second action, the Court will grant a new trial. *Doe dem. Eastabrooks* v. *Humphrey*. 103

2. A cut considerable more than 100 m. feet of logs on land mentioned in an agreement, of which he delivered the plaintiff 94 m. feet and sold the remainder to the defendant; the plaintiff claimed the whole of the logs, under a verbal agreement and delivery alleged to have been made after the written agreement, and replevied the logs sold to the defendant, (53 m. feet); the jury found against the plaintiff's claim under the verbal agreement, and gave a verdict for the defendant—the Court refused a new trial, though the plaintiff had not received the whole quantity agreed to be delivered to him—this difference being very small.—*Tompkins* v. *Tibbits*. 317

NONSUIT.

1. Where a plaintiff was nonsuited for not complying with an undertaking to give material evidence in a particular County, the Court set aside the nonsuit on payment of the costs of the trial and of the motion to set aside the nonsuit. *DesBrisay* v. *The Commissioners of the E. & N. A. Railway*. 48

2. Where a nonsuit has been ordered on one ground the defendant cannot sustain it by another. *Doe dem. Connel* v. *Dickinson*. 459

In trespass for false imprisonment against Justices of the Peace where the Justices had exceeded their powers in committing the prisoner to an improper place of imprisonment for contempt, but where the plaintiff had received no greater punishment than he was entitled to by the law,

the Judge offered to direct to the jury to find a verdict for the plaintiff with nominal damages. The plaintiff refused to accede and claimed substantial damages, whereupon the Judge nonsuited him, and the Court refused to set the nonsuit aside. *Armstrong* v. *McCaffry*. 525

NOTICE.

See INSOLVENT DEBTOR, 3. COMMISSIONER, 3.

1. Where an assessment is made under the Parish School Act, the assessors must give notice thereof, in the same manner as in cases of assessment for county rates, under 1 Rev. S. cap. 53, § 12. EX PARTE *Street*. 106

NOTICE OF ABANDONMENT.

See INSURANCE, 1.

NOTICE OF ACTION.

See POLICE, 1. JUSTICE OF PEACE, 2.

A notice of action stated: "That you, the said E. "P. (defendant) on the 23rd December, 1863, at "the Parish of K., and County of K., and on "divers other days and times, &c., wrongfully "and maliciously, and without any reasonable "and probable cause, advised and encouraged one "H. P. to bring an action in your Court, before "you as a Justice of the Peace, against the plain-"tiff, in a matter of real estate, wherein the title "of land was and did come in question, and "wherein you had no jurisdiction as a Justice of "the Peace (setting out the proceedings and the "award of judgment against plaintiff), and that "you, the said (defendant) on the day and year "last aforesaid, issued in the aforesaid case, "wherein you had no jurisdiction, as aforesaid, "an execution on the said judgment against the "goods and chattels of the plaintiff, and caused "his goods and chattels to be seized under such "execution to satisfy the same."

Held, That the issuing of the execution was a continuation of the previous proceedings in the suit; and, therefore, that the time and place of the issuing was stated with sufficient certainty in the notice. *Pickett* v. *Perkins*. 131

A constable who executes a capais in a suit in which he is the plaintiff, is not entitled to notice of action before being sued for the arrest. *Condell* v. *Price*. 332

NOTICE OF DEFENCE.

See PROMISSORY NOTE, 6, 7.

NOTICE OF TRIAL.

Where no notice of trial was given by plaintiff, and a counsel who had been retained for defendant in a former trial, in ignorance of this fact, appeared without authority, defendant being absent, and defended, a verdict for the plaintiff was set aside. *Doherty* v. *DesBrisay*. 497

ORDER.

See BASTARDY, 1.

P

PARTNERS.

F & S D and B entered into a partnership for the buying and selling of shingles; F & S D to furnish the capital, and B to purchase shingles; profits to be equally divided. The shingles to be shipped to F & S at Boston, and money to be provided by drafts drawn by D upon them; the business in New Brunswick being done under the name of M & D. Plaintiffs sold goods to D on the credit of the partnership and took his notes in payment. Held, That the goods being proper for the business of the firm, and sold on the credit of the firm, the other partners were liable, and that as regards contracts with third parties it was of no consequence whether D had advanced his proper share of the capital or not. *Jones* v. *Foster et al, impleaded with Dowling*. 607

PARTNERSHIP.

See EVIDENCE, 6, 7.

PERJURY.

1. Perjury cannot be assigned upon an affidavit taken before a commissioner, who had no authority to take the affidavit. *Regina* v. *McIntosh*. 372

2. The meaning of the definition of perjury in 1. Rev. Stat., c. 161, § 30, is that perjury can only be assigned for false swearing, before an officer authorized to administer an oath, in the particular proceedings in which the witness was sworn. *Ibid*.

PLEADING.

See ESTOPPEL, 2.

POLICE.

The Police Act, 11 Vict., c. 13, § 22, does not authorize the arrest without warrant, of known residents of the place; nor is a person who acts as a principal in directing a policeman to make an arrest, entitled to notice of action under that Act. *Foley* v. *Tucker*. 52

POWER OF ATTORNEY.

See AGENT, 1.

POWERS OF LEGISLATURE.

See INSOLVENCY, 1.

Where an Act of the Local Legislature conflicts with an Imperial Statute, the Court will pronounce upon its validity. *Reg.* v. *Chandler*. 556

PROBATE COURT.

1. The Probate Court has jurisdiction to grant administration, without a citation, on the estate of a person dying in the Province, on the petition of a person alleging himself to be a creditor of the deceased, and that he died without leaving any next of kin. *Doe dem. Shore* v. *Gearon*. 144

2. If administration is irregularly granted, application should be made to the Probate Court to revoke it. *Ibid*.

PROMISE.

A promise by an underwriter to pay the amount of the loss claimed by the assured, is *prima facie* evidence of the right of the assured to recover, and of the amount of the loss; and, unanswered, entitles the assured to recover the amount so admitted. *Gilbert* v. *Stockton*. 58

PROMISSORY NOTE.

See CONSIDERATION, 1. SURPRISE, 2.

1. Defendant, by writing, promised to pay A, "or her heirs," a certain sum of money. On the death of A, the right to recover the money vests in her personal representative, and not in her heirs.

Semble, That the instrument is a promissory note. *Doak, Administrator, &c.*, v. *Robinson.* 279

2. H gave the defendant a promissory note for the price of goods purchased from him, which note the plaintiff discounted for the defendant, who received the proceeds; when the note became due, it was renewed by H, and the new note indorsed by the defendant and held by the plaintiff. Held, that this was only an extension of the time for payment, and did not alter the original liability of the defendant as indorser. *The Commercial Bank* v. *Williston and another.* 283

3. Before the renewal of the note, H, who was largely indebted to the plaintiff, as the drawer of a number of other notes, paid the plaintiff a sum of money without making any appropriation of it; he soon afterwards asked the plaintiff to give him credit for it, for the benefit of his indorsers; but the evidence left it uncertain whether it was for the benefit of his accommodation indorsers only, or for his indorsers generally, and a verdict having been given for the plaintiff for the amount of the note, without any deduction on account of the money paid by H, a new trial was granted, in order to ascertain whether the indorsers generally were entitled to participate in the payment by H. It being the defendant's duty to establish this fact, the new trial was granted on payment of costs. *Ibid.*

4. A promissory note drawn in Boston, where both the maker and payee resided, was made payable "at any bank." Held, That this meant any bank in Boston. *Baldwin* v. *Hitchcock, impleaded with Howard.* 310

5. It is not competent for a party who indorses a note, and delivers it to a bank, to set up as a defence that the signature of the maker was forged. *McLeod* v. *Carman and others.* 602

6. In an action by a *bona fide* holder, against the indorsers of a promissory note, a notice of defence that the indorsement was made by one of the partners, in the name of the firm, without the sanction of the rest, and that the note was unconnected with the business of the firm, was held to be bad. *Ibid.*

7. In an action against the indorsers, a notice of defence that the holder of the note, before it became due, had released the indorsers from all actions and causes of action, judgments, bills, notes, accounts, claims and demands, at law or equity, was held to be good. *Ibid.*

PRACTICE.

See AMENDMENT, 1, 2.

1. Where an issue is sent down for trial by the equity side of the Court, under 17 Vict., cap. 18, § 18, (2 R. S., p. 80) a motion for a new trial must be made before a Judge in Equity. *Hodge* v. *Reid.* 89

2. A defendant is entitled to a month to answer after the filing of the bill; and notice of motion to take the bill *pro confesso* cannot be given till the expiration of that time, though a copy of the bill and interrogatories may have been served on the defendant more than a month before the notice. *Godfrey* v. *Oglesby.* 233

3. In an action by the assignee of a limit bond, to which *non est factum* is pleaded, the common *venire* to try the issue, is sufficient; and the plaintiff need not have damages assessed, but may take a verdict for nominal damages, and issue execution for the amount of his debt. *McElroy* v. *Getty and another, impleaded with Ellis.* 261

4. A motion for a *venire de novo* may be made in the same manner as a motion for a new trial. *Pelton* v. *Temple.* 274

5. The affidavits upon which a warrant under the Absconding Debtors' Act is issued, may be sworn before the attorney of the petitioning creditor. *Regina* v. *Steadman.* 368

6. Defendant moved for judgment as in case of a nonsuit against the plaintiff for not proceeding to trial pursuant to a peremptory undertaking. It was discovered that no entry had been filed in the clerk's office, and that the only paper in the cause on file was the notice of appearance. Held, That the cause was not in Court, and no judgment could be given. *Miller* v. *Weldon.* 376

7. Where at the trial, a nonsuit was moved, and upon hearing the opinion of the Judge, a verdict was taken by consent of counsel, the question cannot afterwards be raised, as to whether the case should have been submitted to the jury. *Reed* v. *Weldon.* 460

Q

QUO WARRANTO.

1. When a person elected a city councillor has entered upon, and is exercising the office, a *quo warranto* is the proper mode of trying his right to it. *Ex parte Cameron.* 308

2 A decision of the City Council in favor of the election, on the complaint of an elector, under the 24th sect. of the Act, does not preclude the elector from applying for a *quo warranto* to try the right. *Ibid.*

R

RAILWAY COMMISSIONERS.

See LAND DAMAGES.

REASONABLE AND PROBABLE CAUSE.

1. Plaintiff was a boarding-house keeper, in whose house defendant had boarded, having the use of a room, and some furniture of his own. He went to England, leaving his furniture in the house, and after being absent several months, applied through his agent, to the plaintiff for the furniture; she gave up a portion of it, but kept the rest, claiming a lien on it for a balance due from defendant for board. Defendant then brought an action of replevin for the furniture, and obtained a verdict, the Judge ruling that a boarding-house keeper had no lien on the goods of his guest. Before and after the trial negotiations for settlement took place between the attorneys, plaintiff offering to give up the goods on being paid a certain sum, which defendant refused, offering a smaller sum. The plaintiff's counsel applied for

a new trial in the action of replevin, on the ground of misdirection as to the lien, and the Court, after a few days consideration, refused a rule. While this motion was pending, and while the plaintiff's counsel was absent from the town where she lived, attending the Court, defendant again applied to her for the furniture, offering her a sum of money if she would give it up in the absence of her attorney, and threatening to take proceedings against her and ruin her house if she refused: the plaintiff still claimed a right to hold the furniture, and refused to do any thing in the absence of her attorney. Defendant then applied to the Police Magistrate, and obtained a warrant against the plaintiff under the Act 27 Vic. c. 6, for unlawfully, as a bailee, detaining his property and converting it to her own use, under which warrant she was arrested and imprisoned for want of bail, and on examination, the charge was dismissed. In an action for malicious prosecution and false imprisonment the jury were directed that if the plaintiff was a bailee of the goods, and fraudulenty converted them to her own use, the defendant had probable cause for the prosecution, whatever he might have believed on the subject; that if plaintiff had not fraudulently converted the goods, if defendant believed, and had reasonable grounds for believing that she had done so there was also probable cause; but if he did not believe plaintiff to be guilty of fraudulent conversion, and in his own mind believed and had reasonable grounds for believing her innocent, then there was want of reasonable and probable cause.

Held, That the direction was right; that the knowledge and belief of the defendant as to the plaintiff's claim to hold the goods, and his acts in reference thereto, and the inferences to be drawn from the acts of the parties, the negotiations for settlement, the claims by one party and the offers by the other, were proper matters for the consideration of the jury; and that the Judge would not have been justified in directing the jury, that as the plaintiff had no legal right to detain the goods, her refusal to give them up, afforded probable cause for instituting the prosecution against her under the Act.

Held also, That under the circumstances, a verdict for £500 damages, was not excessive, it not being shown that the jury were actuated by any improper motive, or acted on a wrong principle. *Abell* v. *Light*. 240

2. Where inferences are to be drawn from the facts proved in an action for malicious prosecution, the case must be left to a jury: and the question of "probable cause" should not be determined by the Judge alone. *Alward* v. *Sharp*. 286

3. When the evidence, tending to show whether the plaintiff was or was not guilty of the crime charged against him is conflicting, the Judge cannot determine the question of "reasonable and probable cause." *Vincent* v. *West*. 290

RECOGNIZANCE.

See BASTARDY, 3.

A recognizance entered into for the prosecution of an election petition before the House of Assembly, under the Rev. Stat. c. 98, and certified to the Supreme Court by the Speaker as forfeited, is not a record; and in *scire facias* on such a recognizance with an averment *prout patet per recordum*, to which the defendant pleaded *nul tiel record*, the production of the recognizance so certified from the files of the Court does not prove the issue. *The Queen* v. *Sparrow and others*. 237

REGISTRAR.

See JUDICIAL NOTICE, 2.

REMANENT.

A cause can only be made a *remanent* by order of the Judge at *Nisi Prius*. *Shepherd* v. *Hallett*. 43

RIGHT OF WAY.

The owner of land laid out and opened an alley-way leading from a street, through his land, and leased the lots on each side of the alley. After the alley had been used by the public and the tenants occupying the lot for more than twenty years, G, the administrator of one of the tenants, assigned to the defendant, and by the description of the land in the deed, conveyed to him the alley as a part of the property leased. Held, That this conveyance could not affect the right of the public to use the alley, and that the defendant was liable for obstructing it, though the plaintiff was the tenant of a house fronting on the alley, and also claimed under G as representing another lessee of the property. *Leary* v. *Armstrong*. 22

S

SCHOOL ASSESSMENT.

See NOTICE, 1.

SEA WALLS.

See CORPORATION, 1.

SECONDARY EVIDENCE.

See EVIDENCE, 23, 24.

SECURITY FOR COSTS.

See CERTIORARI, 2.

SEPARATE PROPERTY.

1. Land was conveyed to a married woman, for life, for her separate use; it was managed under her directions, and the labor paid for by the produce of the land, the husband not interfering except as her agent. Held, 1st, That under the Rev. Stat., c. 114, the crop, when severed, did not become the property of the husband, and was not liable to seizure under an execution against him. 2nd, That an action for seizing the crop, under execution against the husband, was rightly brought in the name of husband and wife. *Dow and Wife* v. *Dibblee*. 55

2. A married woman, whose husband is insane and confined in a Lunatic Asylum, and who is compelled to support herself by keeping a boarding house, may sue and recover in her own name, the amount due from a boarder lodging in the house after her husband's insanity, under the Rev. Stat., c. 114, § 3.

The amount due from a boarder under such circumstances, vests in the woman as her separate property, and will not pass to the husband's representatives on his death. *Abell* v. *Light*. 97

STAMP ACT.

An unstamped cheque upon a party, not being a chartered or licensed Banker or Savings Bank, is void under Canadian Stat., 31 Vict., cap. 9, and cannot be received as evidence of payment. *Gandy* v. *Staples, et al.* 627

STATUTE OF FRAUDS.

See CONTRACT, 10.

STATUTE OF LIMITATIONS.

See NEW TRIAL, 1. ESTOPPEL, 6. EJECTMENT, 2.

STOCKHOLDER.

See EVIDENCE, 27.

The stockholders of the Westmoreland Bank, by their charter, in addition to the liability of the stock held by them for payment of the debts of the Bank, are liable in their private and individual capacity for an amount equal to the sum of their stock. *McKenzie, Curator of Westmorland Bank* v. *Wiswell.* 511

The executors of the estate of C. invested a portion of its funds in bank stock in their own names, but for the benefit of the estate, by which the dividends were received. After their death their representatives, by writing, agreed to transfer the stock to the widow of C, who had taken out letters of administration *cum testamento annexo de bonis non.* The stock certificates were handed over to her and she afterwards received the dividends, but no transfer was made on the books of the bank as required by its charter and bye-laws. The bank suspended, and the estates of the executors were placed by the Judge on the list of contributories for the stock standing in their names on the register.

Held, That they being *prima facie* legally liable the Judge was right in not altering the register by substituting the party equitably entitled to the stock. *In re President, &c., Westmorland Bank. Ex parte Allison.* 514

STUDENT.

To entitle a Student at Law to the benefit of the reduction of the term of study allowed to graduates by the Act 26 Vict., c. 23, he must be a graduate at the time of commencing his study. *Ex parte Travis.* 30

SUBSTITUTED AGREEMENT.

See CONTRACT, 10.

K, who held a quantity of logs claimed by P, sold them to H, who placed the money in the hands of defendant, both parties agreeing that if not replevied by P in six days it was to be paid to H. P was about to replevy, but before the six days expired K agreed with him to submit the matter to arbitration, the money to abide the event; but after the time elapsed, K refused to arbitrate, and claimed the money under the first agreement.

Held, In an action against defendant on the first agreement for the money, that as the substituted agreement altered the position of the parties, it was an answer to the action. *Keith et al. Administrators* v. *Skinner.* 505

SUPERSEDEAS.

A defendant, rendered by his bail after judgment, wrote to his attorney, requesting him to see the plaintiff's attorney and endeavor to compromise the debt and get time for payment. Within three months after the render of the defendant, this letter was communicated to the plaintiff's attorney, who, after seeing the plaintiff, informed the defendant's attorney of the terms on which the plaintiff was willing to settle.

Held, That it was the duty of the defendant's attorney to communicate the offer to his client, and that until he did so, the treaty for settlement was pending, and the defendant was not entitled to a supersedeas for not being charged in execution within three months after the render. *Jones* v. *Steeves.* 260

SURPRISE.

1. A new trial, on the ground of surprise, was refused, where the defendant knew, the day before the trial, of the evidence the plaintiff was going to give, and might have applied for a temporary postponement of the trial in order to answer the evidence. *Gilbert* v. *Stockton.* 58

2. One of the signatures to a joint note was "Francis Howard," an action was brought against the other maker of the note, and Francis Howard, who was so named in the declaration: Howard was not served with process. At the trial, the plaintiff to prove the making of the note, gave evidence of the handwriting of a man named Francis Howard; and the defendant endeavored to shew by cross-examination that the other maker of the note was a female. Held, That as the declaration stated the name to be "Francis," and the defendant knew before the trial who the other maker of the note was, he was not entitled to a new trial on the ground of surprise. *Baldwin* v. *Hitchcock.* 310

T

TAXATION.

See COSTS.

TENANT IN COMMON.

One tenant in common cannot maintain an action for money had and received against his co-tenant, for receiving more than his share of the rents and profits of the joint property, unless there is an account settled and balance agreed upon, even though the defendant may have acted as bailiff of the other co-tenants in receiving the rents. *Frost and another* v. *Disbrow.* 73

Defendant being a tenant in common with the plaintiffs who were infants, rendered in an account, in which he acknowledged a certain sum to be due from him to the plaintiffs, as their share of the rents of the joint property which he had received; the plaintiffs' guardian disputed the correctness of the account, and claimed a much larger sum from the defendant. Held, In an action for money had and received, that such balance not having been agreed to, the plaintiffs were not entitled to retain a verdict for that amount. *Ibid.*

TENANT BY THE COURTESY.

See EXECUTION, 3.

TERMINATION OF PROCEEDINGS.

See JUSTICE OF PEACE, 1. CRIMINAL PROCEDURE, 2.

TRANSFER.

1. A., the owner of timber in possession of the Fredericton Boom Company, for the purpose of being rafted, agreed verbally to transfer it to the plaintiff, to be sold to pay certain creditors of A., and gave the planitiff a written order upon the agent of the Boom Company, to deliver to the plaintiff all the lumber in the boom belonging to A. of certain marks. When the order was presented, the Secretary of the Company said it would be all right; but no transfer was made in the books of the company, nor any delivery of the timber to the plaintiff, nor any dealing with it by him.

Held, That no property passed to the plaintiff, and that the timber was liable to an execution subsequently issued against A. *Allen* v. *Ferguson and White.* 149

2. The plaintiff claimed lumber under a letter written to him by A., the maker of the lumber, stating that part of a quantity of lumber in the river, which part was distinguished by a particular mark, was for the plaintiff, and requesting the plaintiff to send money and provisions to A., and furnished the marks of the lumber to the defendants, a company incorporated for the purpose of picking up and rafting lumber, and afterwards obtained a portion of the lumber from them. Held, That the letter was an appropriation of the lumber by A. to the plaintiff, and that his subsequent acts were an assent to such appropriation which vested the property in him. *Macpherson* v. *Fredericton Boom Company.* 336

TRESPASS.

See DAMAGES.

A., by will executed in 1824, devised lot No. 11 to his son G., except 100 acres, which he gave to other children, and he likewise gave to his son D. the privilege of keeping a saw mill where it then stood, with a log and lumber yard, without molestation or hindrance; but not to dispose of the said mill privilege to any person except his brother G. or his liberty; and all the remainder of said lot No. 11, to remain and be to his son G., with the above exception. G. died in 1840, having devised all his property to his sons, one of whom was the plaintiff. The plaintiff's property was escheated in 1852, and partition made between the Crown and the other heirs of G., by which the saw mill, with the log and lumber yard adjoining, and the privilege of water for the use of the mill, were awarded to D., to hold according to the will of A. The Crown afterwards granted its portion of the land to plaintiff, excepting the saw mill, with the log and lumber yard adjoining, and the use of the water for the mill, as awarded to D. in the partition. D. died in 1861, and devised the saw mill and privilege to the defendant. --The plaintiff had a fulling mill on the land granted to him by the Crown. The fulling mill and saw mill were supplied with water from the same aqueduct. Both mills could not be worked at the same time, and when the fulling mill was in operation the water was diverted from the saw mill by an opening in the aqueduct.

Held, In trespass for taking possession of the saw mill, injuring the gates and diverting the water from the fulling mill: 1. That if the will of A. gave D. only a life estate in the saw mill, the plaintiff had no right, as any interest he might have had as one of the heirs of A., was escheated to the Crown, and excepted out of the grant to him. 2. That in such case the defendant, as one of the heirs of A., would have an undivided interest in the saw mill with the Crown, and not with the plaintiff. 3. That if, in diverting the water from the fulling mill, the defendant did no more than was necessary for the reasonable use of the water for the saw mill, the plaintiff could not recover for that act, and that such question should have been left to the jury. *Pickett* v. *Pickett.* 156

2. The owner of land, subject to an estate for life, may maintain trespass *de bonis asportatis*, for carrying away trees which have been wrongfully cut upon the land. *Alexander* v. *Hartt.* 161

3. A constable is liable in trespass, if he arrests a debtor under an execution issued out of a Justice's Court, (1 Rev. Stat. c. 137), before he has used reasonable diligence to find goods to levy on. *Hunter* v. *Maddox.* 162

4. In trespass against several defendants, the plaintiff had forbidden them from going on his land, and again, after acts of trespass had been committed, notified them to desist, whereupon two of them did so. At the trial, plaintiff elected to proceed against all the defendants, and, under the Judge's direction, only recovered for the trespass committed before the two defendants left, amounting to $2 Held, That the plaintiff was entitled to the certificate of the Judge; that the trespass was "willful and malicious." *McMillan* v. *Fairly, et al.* 504

TRUSTEES.

See JURISDICTION, 1.

U

UNDERWITER.

See PROMISE, 1. INSURANCE, 1.

USAGE OF TRADE.

See CONTRACT, 4.

USE AND OCCUPATION.

1. Assumpsit lies for the use and occupation of a pew; and it is no defence under the general issue, that other persons occupied the pew jointly with the defendant. *The Trustees of St. Andrews Church* v. *Ferguson and another.* 273

USURY.

1. Where a mortgage on real estate was given by A. to B. for the purpose of being sold, and afterwards assigned to C., who took it at a discount of 10 per cent., B., who acted merely as broker in the transaction, receiving 1 per cent. Held, In a suit for foreclosure against the purchaser of the equity of redemption that the transaction was usurious, and that even if defendant was only the colorable purchaser it would not affect the case. *Jardine and others* v. *McWilliams.* 589

VENIRE.

See PRACTICE, 4.

1. Where the sheriff is interested, the jury process must be directed to the coroners of the county, if more than one; and though it may be executed

by one coroner, the return must be in the name of the whole of them. *Noble* v. *Temple*, and *Pelton* v. *Temple*. 274

2. A *venire* directed to one of the coroners of a county is bad, unless the others are interested. *Ibid.*

3. In an action for calls on stock, the coroner who summoned the jury was a stockholder, but before receiving the *venire*, transferred his stock, which was not all paid up, to the president of the company. The Act of Incorporation declared that no shareholder should be entitled to transfer his stock unless all calls were paid. In summoning the jury, the coroner questioned them as to their views in regard to railways, and was guided in his selection by their answers.

Held, That he had not divested himself of his interest, and was not an impartial officer, and there must be a *venire de novo*. *Woodstock Railway Company* v. *Tupper*. 457

VENUE.

The venue in a cause was laid in Northumberland, but the presiding Judge at the Circuit being connected with the plaintiff, declined to try it. The plaintiff then applied to change the venue to Kent, and obtained an order to do so, with leave reserved to the defendant to apply to bring it back to Northumberland. Defendant then obtained an order on the common affidavit to restore the venue to Northumberland. Held, That as this was the first opportunity defendant had of applying to change the venue, the order was properly made. *Rankine* v. *Letson*. 29

VOLUNTEER.

A New Brunswick volunteer, who re-enrolled under 31st Vict., cap. 40, of the Parliament of Canada, is not entitled to the exemption from city, county and parish rates and taxes provided for by the Provincial Act, 28th Vict., cap. 1, sec. 17. *Ruel, Chamberlain of St. John*, v. *Hunter*. 618

WAIVER.

See EVIDENCE, 20.

WILL.

See TRESPASS, 1. CONTRACT, 10.

1. A testator devised as follows: "Also I give to my son S. H. G. the use of my farm (describing it), also to his lawful children, and in case of his death without children, then to be equally divided between my five daughters (naming them) and their heirs forever." When the testator died S. H. G. had no children born; but his wife was then *enceinte*, and a son was born shortly afterwards. S. H. G. at his death left this son and four younger children surviving him

Held, That S. H. G. by this devise took an estate for life, and at his death, all his children then living, an estate in fee. *Gourley and others* v. *Gilbert and others*. 80

2. A. by deed dated 2nd April, 1853, conveyed to his daughter a farm, described as the property purchased by him from B, except a part that he had before leased, to hold the same during his life; and after his decease, he thereby gave, granted, bargained and sold, to his said daughter, her heirs and assigns, "all the above mentioned premises, and every part thereof." The part excepted had been leased by A to T in 1851, for five years, with a covenant to renew or pay for improvements. In January A made his will, stating (*inter alia*) as follows: "I having already conveyed to my daughter E. S., her heirs "and assigns, by way of advancement, subject as "in the deed thereof is mentioned, all that farm "or tract of land situate, &c., formerly purchased "by me from B, with all buildings, &c., to hold "to her, my said daughter, her heirs and assigns. "I do not make further mention of her, my said "daughter, in this, my will."

Held, 1. That the testator's daughter took nothing under the will by implication. 2. That under the deed she took the whole farm after the death of A. *Miles* v. *Coy and Fraser, Executors, &c., of John Harding*. 174

3. Where a will was contested by the heir-at-law, on the ground of undue influence by the devisee with the testator, but no evidence thereof was given, the Judge should not leave such a question to the jury. *Doe ex dem. Levi* v. *Simmel*. 265

4. Letters written by a testator to his relatives before making his will, stating his intention to leave his property to them, are not admissible in evidence to defeat a will disposing of his property to another person; though the will is attacked on the ground of the testator's incapacity, as being *in extremis* at the time of its execution. *Ibid.*

WITNESS.

See ATTACHMENT, 1.

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